(25,403)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 573.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

RALPH W. MOORE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print
Caption	1	1
Appellant's abstract of record	2	1
Petition	3	2
Petition for removal	6	3
Bond for removal	10	6
Petition for removal denied	12	7
Bill of exceptions filed	12	7
Amended petition	12	7
Second amended petition	16	9
Answer	18	10
Trial, &c.	19	11
Verdict	20	11
Judgment	20	12
Statement of proceedings	21	12
Term bill of exceptions	22	12
Order denying petition for removal	23	13
Judge's certificate to bill of exceptions	24	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 31, 1916.

	Original.	Print
Trial bill of exceptions	24	14
Testimony of Ralph W. Moore	25	14
Exhibit B—Stipulation of facts	29	17
Testimony of Samuel A. Baughman	92	54
Roy Pigg	101	60
George Miller	133	79
William H. Temps	162	97
Norman Hawkins	182	108
E. O. Weber	197	118
R. C. Guthrie	202	121
Wm. Lorergan	205	123
Charles Irvin Sheperd	222	134
C. F. Coy	225	136
J. T. Forrest	234	141
Exhibit 3—Photograph	252	148
Testimony of C. H. Conkwright	253	149
H. C. Dietrickson	267	153
M. A. Hartigan	283	158
F. T. Slayton	288	161
J. H. McGoff	292	163
J. W. Twedell	309	172
W. C. Smith	323	178
Charles Edward Hedrix	330	180
N. S. Erhart	340	185
William N. Purvis	345	188
Exhibit 6—Report of accident and statement of R. Pigg	350	190
Testimony of Rufus B. Tansell	350	191
J. J. Acker	352	191
E. Alberts	358	194
James H. Donan	365	197
Exhibit 4—Affidavit of Moore as to loss of limb, &c.	373	202
J—Affidavit of Roy Pigg	377	204
I—Affidavit of C. E. Hedrix	379	205
Testimony of Patrick F. Barry	381	206
R. E. Malone	393	213
Morris Wasser Krug	407	220
Millard C. Smith	415	225
Exhibit G—Photograph	433	232
Testimony of J. T. Forrest (recalled)	434	233
Testimony of J. E. Koerner	437	234
Instructions requested by defendant	443	237
Instructions requested by plaintiff	444	238
Instructions requested by defendant	450	242
Verdict	462	249
Motion for new trial	463	249
Motion in arrest of judgment	466	252
Affidavit for appeal	469	253
Judge's certificate to bill of exceptions	470	254
Judgment	470a	255
Opinion, Blair, J.	471	255

	Original.	Print
Order overruling motions for rehearing and to transfer to court in banc	483	263
Motion to transfer to court in banc	484	264
Motion for rehearing	488	265
Order overruling motion to transfer to court in banc	497	270
Motion to transfer to court in banc	498	270
Order allowing writ of error	502	272
Petition for writ of error	503	273
Assignment of errors	519	280
Order allowing writ of error	526	284
Writ of error	528	285
Certificate as to acting chief justice	530	286
Citation and service	531	286
Præcipe for record and service	533	287
Bond on writ of error	538	290
Clerk's certificate	540	291
Prayer for reversal	541	292
Order enlarging time for filing, &c.	544	292

1 In the Supreme Court of Missouri.

Be it remembered, that on September 16th, 1912, there was filed in the office of the Clerk of this Court a certain certified transcript of record of the Circuit Court of Buchanan County, Missouri, in a civil action in which Ralph W. Moore was plaintiff-respondent, and The St. Joseph & Grand Island Railroad Company was defendant-appellant.

In the Supreme Court of Missouri, October Term, 1914, Division No. 1.

17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

And thereafter, to-wit, on January 9th, 1915, Appellant filed its said Abstract of the record in said cause.

Which said Abstract of the record as called for in the præcipe filed herein is in words and figures as follows:

2 In the Supreme Court of Missouri.

No. 17221.

RALPH W. MOORE, Respondent,
versus
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Buchanan County, Missouri.

Appellant's Abstract of the Record.

Robert A. Brown, Lucian J. Eastin, Attorneys for Appellant.

3 In the Supreme Court of Missouri.

No. 17221.

RALPH W. MOORE, Respondent,
versus
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Buchanan County, Missouri.

Appellant's Abstract of the Record.

Abstract of Record Proper.

This cause was instituted in the Circuit Court of Buchanan County, Missouri, by the respondent, by filing therein on the third day of February, 1911, the following petition (caption omitted):

Plaintiff for a cause of action states that at all the times herein mentioned the defendant was and now is a corporation duly organized and operating a line of railroad as a common carrier in, to and through the states of Missouri, Kansas and Nebraska, and in, to and through the towns of Hanover, Marysville and Hiawatha,
4 towns in the State of Kansas and St. Joseph, a city in the State of Missouri; that at all the times herein mentioned the defendant was and now is engaged as a common carrier by railroad in interstate commerce between the several states of Missouri, Kansas and Nebraska.

Plaintiff further states that on the 9th day of June, 1910, he was in the employ of the defendant company as a brakeman and engaged in interstate commerce; that the defendant on said date was engaged in moving a train upon which the plaintiff was an employe in interstate commerce between the states of Missouri, Kansas and Nebraska, and in, to and through the town of Marysville in the State of Kansas, that on said 9th day of June, 1910, the defendant owned, and operated as a part of its train running in interstate commerce and as a part of the train upon which plaintiff was employed, a freight engine and tender number 45, and carelessly and negligently maintained said engine and tender with a steam hose equipment on the rear end of said tender which reached down to within a few inches of the surface of the track from the rear end and body of said tender; that said steam hose so maintained upon said engine and tender rendered the same dangerous and unsafe for the use of defendant's employes and this plaintiff in working in, upon and around said engine and tender in freight service and in switching at stations while moving said train in interstate commerce.

Plaintiff further states that on the 9th day of June, 1910, while in the performance of his duties and in the exercise of care and caution and while working in interstate commerce, he was working upon, about and near said engine and tender and upon defendant's

track at a point about six hundred feet north of the north line
5 of the depot platform of the defendant company and in the town of Marysville, Kansas; that the defendant company and its agents, and servants in charge of said engine and tender so equipped with a steam hose upon the rear of said tender as aforesaid, and controlling its movements, carelessly and negligently while engaged in interstate commerce, backed said engine against, upon and over the plaintiff without any signal from the plaintiff.

That the plaintiff was on account of the negligence and carelessness of the defendant and its agents and servants controlling the movements of said engine and tender in carelessly and negligently causing said engine and tender to be backed without any signal from the plaintiff, and on account of the steam hose equipment so negligently maintained by the defendant on the rear of said engine and tender as aforesaid, caught, and thrown upon the track and run against, upon and over, thereby crushing and tearing from his body both hands and arms, and breaking, crushing and mangling the bones of plaintiff's left leg and thigh, and crushing, tearing and cutting the muscles, arteries, veins, nerves, ligaments of plaintiff's left leg, and crushing, bruising and lacerating the muscles, nerves, veins, arteries and ligaments of plaintiff's arms and head.

That on account of the above and foregoing the plaintiff has and will in the future suffer great bodily pain and mental anguish; that he has been unable to do any work of any kind since the receipt of said injuries and will in the future be unable to perform work of any kind or character; that his ability to earn a livelihood has been permanently impaired and decreased; that he is unable to feed or dress himself or care for his person and has and will in the future be compelled to spend large sums of money for the
6 care of himself in feeding, dressing and caring for himself; that he has been compelled to spend large sums of money and contract large indebtedness for medicines and medical attention, and will in the future be compelled to spend large sums of money for medicines and medical attention.

That on account of the above and foregoing he has been damaged in the sum of one hundred thousand dollars ($100,000.00), for which, together with his costs in this behalf expended, he prays judgment.

MYTTON & PARKINSON,
Attorneys for Plaintiff.

Attest: A true copy.

ROSS C. COX, *Clerk.*
[SEAL.] By ISABEL HESSELBERGER, *D. C.*

On May 1, 1911, the same being the first day of the return term of said petition and the summons issued thereon, the appellant, before filing answer or other pleading to plaintiff's petition, filed the following petition and bond for the removal of this cause to the United States Circuit Court for the proper division and district (caption omitted).

Petition for Removal to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

Your petitioner, The St. Joseph & Grand Island Railway Company respectfully shows to this Honorable Court that it is the defendant in the above entitled cause, which is of a civil nature, and that the matter and amount in dispute exceed- the sum of two thousand dollars ($2,000.00), exclusive of interest and costs.

7 That this suit was begun in the Circuit Court of Buchanan County, Missouri, on the third (3rd) day of February, 1911, by the plaintiff, by filing in the office of the clerk of said Circuit Court a petition, and by serving upon this defendant a writ of summons; that said cause is still pending and undetermined, and that the May Term, 1911, of said Circuit Court to be held in Buchanan County, Missouri, is the first term of said Circuit Court at which said cause could be tried.

That your petitioner has not answered nor pleaded to the petition of plaintiff, and is not required so to do under the laws of the state of Missouri until the first (1st) day of May, 1911.

Your petitioner shows to this Honorable Court that there is in said suit a controversy which is wholly between citizens of different states and which can be determined as between them, towit:

A controversy between your petitioner, which avers that it is and was at the time of the commencement of this suit and still is, a corporation organized in and chartered by the states of Kansas and Nebraska; that it was then and still is a resident and citizen of said states of Kansas and Nebraska, and was not then and is not now a citizen or resident of the state of Missouri, and that the said plaintiff, as your petitioner avers, was at the time of the commencement of this cause of action and still is a citizen and resident of the state of Missouri, and then resided and now resides in the city of St. Joseph, Missouri; and that said controversy is of the following nature, viz.:

Plaintiff alleges in his petition that on the ninth day of June, 1910, he was in the employ of the defendant company as a

8 brakeman and engaged in interstate commerce; that the defendant on said date was engaged in moving a train upon which the plaintiff was an employee in interstate commerce between the states of Missouri, Kansas and Nebraska and in, to and through the town of Marysville in the state of Kansas that on said ninth day of June, 1910, the defendant owned, and operated as a part of its train running in interstate commerce and as a part of the train upon which plaintiff was employed a freight engine and tender number 45, and carelessly and negligently maintained said engine and tender with a steam hose equipment on the rear end of said tender which reached down to within a few inches of the surface of the track from the rear end and body of said tender; that said steam hose so maintained upon said engine and tender rendered the same dangerous and unsafe for the use of defendant's employees and this plaintiff in working in, upon and around said

engine and tender in freight service and in switching at stations while moving said train in interstate commerce.

Plaintiff further states that on the ninth day of June, 1910, while in the performance of his duties and in the exercise of care and caution and while working in interstate commerce, he was working upon, about and near said engine and tender and upon defendant's track at a point about six hundred feet north of the north line of the depot platform of the defendant company and in the town of Marysville, Kansas; that the defendant company and its agents, and servants in charge of said engine and tender so equipped with a steam hose upon the rear of said tender as aforesaid, and controlling its movements, carelessly and negligently while engaged in interstate commerce, backed said engine against, upon and over the plaintiff without any signal from the plaintiff.

9 Your petitioner avers that this suit is a controversy solely between citizens of different states, and your petitioner further avers that the cause of action, if any, that the plaintiff herein has, is shown by his petition to be one based upon and in pursuance of the statutes and laws of the United States of America, and particularly is in pursuance of the Act of Congress of April 22, 1908, and acts pursuant thereto and amendatory thereof, for the determination of the liability of common carriers by railroad to their employees for injuries received by such employees while in the service of such common carriers; that the only cause of action which the plaintiff herein has, if any, he has by virtue of the aforesaid laws of the United States, and that such cause of action depends upon and involves the construction and application of such laws of the United States, and is therefore within the jurisdiction of the courts of the United States.

Your petitioner desires to remove this suit before the trial thereof into the next Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, to be held at St. Joseph, Missouri.

Your petitioner herewith offers a bond with good and sufficient surety for its entering into the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri on the first day of the next term session a copy of the record in this suit and for paying all costs which may be awarded by said Circuit Court, if said court should hold that this suit was wrongfully or improperly removed.

Your petitioner therefore prays this Honorable Court to proceed no further therein, except to make the order of removal re-

10 quired by law, and to accept said bond and surety, and to cause the record herein to be removed into the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

And it will ever pray.

THE ST. JOSEPH & GRAND ISLAND RAILWAY CO.,
By GRAHAM G. LACY, *Pres.*

R. A. BROWN,
Attorney for Petitioner.

STATE OF MISSOURI,
County of Buchanan, ss:

Graham G. Lacy says he is the President of The St. Joseph & Grand Island Railway Company, and makes oath that the foregoing petition is true of his own knowledge, except as to matters therein stated to be upon information and belief and as to these matters he believes it to be true.

GRAHAM G. LACY.

Subscribed and sworn to before me this first day of May, 1911.
[SEAL.] B. R. D. LACY,
Notary Public.

My commission expires Feb. 27, 1913.

Bond for Removal to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

Know all men by these presents: That we, The St. Joseph & Grand Island Railway Company, a corporation duly created
11 and existing under the laws of the states of Kansas and Nebraska, as principal, and Graham G. Lacy and E. H. Zimmerman as sureties, are held and stand firmly bound unto Ralph W. Moore, in the penal sum of one thousand dollars ($1,000.00), for the payment of which, well and truly to be made to said Ralph W. Moore, his heirs, representatives and assigns, we bind ourselves, our heirs, successors and assigns, jointly and firmly by these presents.

Upon condition, nevertheless, that whereas said The St. Joseph & Grand Island Railway Company has filed its petition in the Circuit Court of Buchanan County, Missouri, for the removal of a certain cause therein pending, wherein the said Ralph W. Moore is plaintiff and the said The St. Joseph & Grand Island Railway Company is defendant, to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

Now if the said The St. Joseph & Grand Island Railway Company shall enter into said Circuit Court of the United States on the first day of the next term session thereof, a copy of the record in said suit, and shall well and truly pay the costs that may be awarded by said Circuit Court of the United States, if said Circuit Court shall hold that said suit was improperly and wrongfully removed thereto, and shall then and there enter into special bail in said action if the same was originally requisite therein, and shall do and perform all other things required by law on the removal of actions from state to United States courts, then the above obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof the said The St. Joseph & Grand Island Rail-

way Company has caused these presents to be executed by its
12 President, and the said Graham G. Lacy and E. H. Zimmerman sureties, have hereto subscribed their names this first day of May, 1911.

THE ST. JOSEPH & GRAND ISLAND RAILWAY CO.,
By GRAHAM G. LACY, *President.*
GRAHAM G. LACY.
E. H. ZIMMERMAN.

On May 27, 1911, the foregoing petition for removal was, after due presentation to the court, denied.

On July 27, 1911, and during the same May Term, 1911, the appellant presented a term Bill of Exceptions taken by it to the action of the court in denying the petition to remove this cause to the United States Court, which was duly allowed, signed, sealed and filed as a part of the record.

The cause having been continued to the October 1911, Term of said court, the plaintiff, on November 16, 1911, and during said term, filed the following amended petition upon which the cause was tried (caption omitted):

Plaintiff for his second amended petition and cause of action states that at all the times herein mentioned the defendant was and now is a corporation duly organized and operating a line of railroad as a common carrier in, to and through the States of Missouri, Kansas and Nebraska, and other states, and in, to and through the towns of Hanover, Marysville, and Hiawatha, towns in the State of Kansas and St. Joseph, a city in the State of Missouri; that at all the times herein mentioned the defendant was and now is engaged as a common carrier by railroad in interstate commerce between the several states of Missouri, Kansas and Nebraska, and other states.

13 Plaintiff further states that on the 9th day of June, 1910, the defendant owned and operated and hauled and permitted to be hauled as a part of its train running in interstate commerce and as a part of the train upon which plaintiff was employed, a freight engine and tender attached thereto, number 45, and negligently, wrongfully and unlawfully hauled and permitted to be hauled and used on its said line of railway, said tender attached to said engine then and there used in moving in interstate traffic without providing said tender with secure grab irons or hand holts in the end of said tender for the security to men in coupling and uncoupling cars, and negligently and wrongfully and unlawfully hauled and permitted to be hauled and used on its said line of railway, said tender attached to said engine then and there used in moving interstate traffic with a coupler thereon designed to couple automatically by impact and to be uncoupled without the necessity of men going between the end of said tender and the ends of other cars in a defective and dangerous condition in this:

That on the 9th day of June, 1910, and for a long time prior thereto said coupler and its parts and attachments thereto would

not work or accomplish the purpose for which it was designed and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the ends of the cars; that at all the times on said date and for a long time prior thereto it was necessary for men and this plaintiff working in, upon and about said tender to go between the end of said tender and the cars to which it might be desired to couple the same and work by hand the coupler and its parts into a position so that the same would couple to the car to which it might be desired to attach the same; that said car was not
14 equipped at said time with a coupler coupling automatically by impact and which would be uncoupled without the necessity of men going between said tender and the ends of cars.

Plaintiff further states that on the 9th day of June, 1910, while in the performance of his duties and in the exercise of care and caution he was working upon, about and near said engine and tender and upon said defendant's track at a point about six hundred feet north of the north line of the depot platform of the defendant company in the town of Marysville, Kansas, and while so doing it was necessary for him to go between the tender and the end of the cars for the purpose of working by hand said coupler so that the same could and would be made to couple with the car to which it was desired to attach the same; that he was compelled to go upon said track at said point and between the tender and the car to which it was to be coupled on account of the defective condition of said coupler, and while so engaged the defendant company and its agents and servants in charge of said engine and tender so equipped with said coupler in said defective condition, and controlling its movements, carelessly and negligently while engaged in interstate commerce backed said engine and tender with steam hose attachment negligently maintained on the rear thereof against, upon and over the plaintiff without any signal from the plaintiff; that the plaintiff was on account of the negligent, wrongful and unlawful act of the defendant in hauling and permitting to be hauled and used upon its line said tender without the same being provided with secure grab irons or any hand holts in the end of said tender for the greater security to defendant's employees, and this plaintiff in coupling and uncoupling cars, and on account of the negligent, wrongful and unlwful act of the defendant in
15 hauling and permitting to be hauled and used upon its line said tender equipped with a coupler and its parts and attachments in the defective condition as aforesaid; and on account of the carelessness and negligence of the defendant and its agents and servants controlling the movements of said engine and tender in carelessly and negligently causing said engine and tender to be backed without any signal from the plaintiff, with a steam hose attachment negligently maintained on the rear thereof, caught and thrown upon the track and run against, upon and over, thereby crushing and tearing from his body both hands and arms, and breaking, crushing and mangling the bones of plaintiff's left leg and thigh, and crushing, tearing and cutting the muscles, arteries,

veins, nerves and ligaments of plaintiff's left leg, and crushing, bruising and lacerating the muscles, nerves, veins, arteries and ligaments of plaintiff's arms and head.

That on account of the above and foregoing the plaintiff has and will in the future suffer great bodily pain and mental anguish; that he has been unable to do any work of any kind since the receipt of said injuries and will in the future be unable to perform work of any kind or character; that his ability to earn a livelihood has been permanently impaired and decreased; that he is unable to feed or dress himself or care for his person and has and will in the future be compelled to spend large sums of money for the care of himself in feeding, dressing and caring for himself, that he has been compelled to spend large sums of money and contract large indebtedness for medicines and medical attention, and will in the future be compelled to spend large sums of money for medicines and medical attention.

16 That on account of the above and foregoing he has been damaged in the sum of one hundred thousand dollars ($100,000.00), for which, together with his costs in this behalf expended, he prays judgment.

MYTTON & PARKINSON,
Attorneys for Plaintiff.

Plaintiff for his second amended petition and second cause of action states that at all the times herein mentioned the defendant was and now is a corporation duly organized and operating a line of railroad as a common carrier in, to and through the States of Missouri, Kansas and Nebraska, and other states, and in, to and through the towns of Hanover, Marysville and Hiawatha, towns in the State of Kansas and St. Joseph, a city of the State of Missouri; that at all the times herein mentioned the defendant was and now is engaged as a common carrier by railroad in interstate commerce between the several states of Missouri, Kansas and Nebraska, and other states.

Plaintiff further states that on the 9th day of June, 1910, he was in the employ of the defendant company as a brakeman and engaged in interstate commerce; that the defendant on said date was engaged in moving a train upon which the plaintiff was an employe in interstate commerce between the states of Missouri, Kansas and Nebraska, and other states, and in, to and through the town of Marysville in the State of Kansas; that on said 9th day of June, 1910, the defendant owned, and operated as a part of its train running in interstate commerce and as a part of the train upon which plaintiff was employed, a freight engine and tender attached thereto number 45, and carelessly and negligently maintained said engine and tender with a steam hose equipment on the rear end of

17 said tender which reached down to within a few inches of the surface of the track from the rear end and body of said tender; that said steam hose so maintained upon said engine and tender rendered the same dangerous and unsafe for the use of defendant's employes and this plaintiff in working in, upon and

around said engine and tender in freight service and in switching at stations while moving said train in interstate commerce.

Plaintiff further states that on the 9th day of June, 1910, while in the performance of his duties and in the exercise of care and caution and while working in interstate commerce, he was working upon, about and near said engine and tender and upon defendant's track at a point about six hundred feet north of the north line of the depot platform of the defendant company and in the town of Marysville, Kansas; that the defendant company and its agents, and servants in charge of said engine and tender so equipped with a steam hose upon the rear of said tender as aforesaid, and controlling its movements, carelessly and negligently while engaged in interstate commerce, backed said engine against, upon and over the plaintiff without any signal from the plaintiff.

That the plaintiff was on account of the negligence and carelessness of the defendant and its agents and servants controlling the movements of said engine and tender in carelessly and negligently causing said engine and tender to be backed without any signal from the plaintiff, and on account of the steam hose equipment so negligently maintained by the defendant on the rear of said engine and tender as aforesaid, caught, and thrown upon the track and run against, upon and over, thereby crushing and tearing from his body both hands, and arms, and breaking, crushing
18 and mangling the bones of plaintiff's left leg and thigh, and crushing, tearing and cutting the muscles, arteries, veins, nerves, ligaments of plaintiff's left leg, and crushing, bruising and lacerating the muscles, nerves, arteries and ligaments of plaintiff's arms and head.

That on account of the above and foregoing the plaintiff has and will in the future suffer great bodily pain and mental anguish; that he has been unable to do any work of any kind since the receipt of said injuries and will in the future be unable to perform work of any kind or character; that his ability to earn a livelihood has been permanently impaired and decreased; that he is unable to feed or dress himself or care for his person and has and will in the future be compelled to spend large sums of money for the care of himself in feeding, dressing and caring for himself; that he has been compelled to spend large sums of money and contract large indebtedness for medicine and medical attention, and will in the future be compelled to spend large sums of money for medicines and medical attention.

That on account of the above and foregoing he has been damaged in the sum of one hundred thousand dollars ($100,000.00), for which, together with his costs in this behalf expended, he prays judgment.

MYTTON & PARKINSON,
Attorneys for Plaintiff.

On November 29, 1911, the appellant filed the following answer to plaintiff's amended petition (caption omitted):

Comes now the defendant in the above entitled cause and for its answer to plaintiff's second amended petition filed in the above en-

titled cause, admits that it is a corporation and is engaged in carrying freight and passengers for hire, and admits that plaintiff
19 sustained certain injuries at the time and place named in his petition.

Further answering, however, the defendant states that whatever injuries plaintiff may have sustained resulted from his own careless and negligent acts in stepping behind the defendant's moving engine and tender and placing himself in a position of peril, and in a position where the rules of the company prohibited his being.

The defendant further states that by accepting employment from the defendant, plaintiff assumed all the risks and dangers ordinarily incident to his employment, and that the injuries sustained by him resulted from one of the risks and dangers incident to his employment.

Wherefore, having fully answered the defendant asks to be discharged, together with its costs in this behalf expended.

R. A. BROWN,
Attorney for Defendant.

The cause came regularly on for trial on February 15, 1912, during the January, 1913, Term of said Circuit Court, plaintiff and defendant being present in person and by attorneys, and the following jury was duly drawn, empanelled and sworn to try the cause: Alfred L. Royalty, Clyde W. Stone, George W. Johnson, Edward Antermeyer, Jesse R. Simmons, James Crockett, Joseph Fuller, John V. Monaghan, Samuel Burton, J. R. Jennings, Thomas A. Baublite, and Kirk Stanton.

Thereupon the plaintiff filed a reply in the nature of a general denial of new matter in the answer.

20 The taking of evidence proceeded regularly from day to day until February 21, 1912, on which day, after the conclusion of the evidence and the arguments of counsel, and after retiring under the instructions of the court to consider their verdict, the jury returned into open court the following verdict:

"ST. JOSEPH, MISSOURI, Feb. 21, 1912.

RALPH W. MOORE, Plaintiff,
versus
ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Defendant.

We, the jury in the above entitled cause, find for the plaintiff on the first count of his petition and assess his damages in the sum of $25,000.00-100.

J. R. JENNINGS, *Foreman,*
G. W. JOHNSON,
J. R. SIMMONS,
J. V. MONAGHAN,
E. A. ANTERMEYER,
JAMES CROCKETT,
KIRK STANTON,
THOS. A. BAUBLITE,
A. L. ROYALTY,
SAMUEL BURTON,
J. A. FULLER."

Whereupon the court entered the following judgment:

"It is therefore ordered, adjudged and decreed by the court in accordance with said verdict that the plaintiff have and recover of and from the said defendant the said sum of twenty-five thousand ($25,000.00), so found for him by the jury in this cause, together with his costs herein expended and have therefor execution."

21 February 24, 1911, and during the same term and within four days after the rendition of said verdict and judgment, the appellant filed its motion for a new trial, and its motion in arrest of judgment, and filed also the affidavits of R. A. Brown and Agnes Van Wye in support of said motions. The motion for a new trial was continued under advisement until the May Term, 1912, and on May 8, 1912, in said May term, the motion for a new trial, and the motion in arrest were duly overruled, and the appellant was given until during the October, 1912, Term of said court to file its Bill of Exceptions.

Thereupon, and on the same day and during the same term, the appellant duly filed its affidavit for appeal, which was adjudged sufficient, and an appeal allowed to the Supreme Court of Missouri. The amount of the appeal bond was fixed at $51,000.00, and during the same term of said court said appeal bond was duly filed and approved by the court.

The time allowed for filing the Bill of Exceptions was by orders of the court duly made and entered of record, duly extended from time to time until March 1, 1913, and on February 27, 1913, the appellant duly presented its said Bill of Exceptions, and the court thereupon made the following order allowing the same:

"Now at this day comes the defendant in the above entitled cause, by its attorneys, and presents its Bill of Exceptions taken and saved by it to the actions and rulings of the court in this cause, which is agreed by the parties to be correct, and which is within the time heretofore allowed by the court in which to file the same, and prays the court that said Bill of Exceptions may be approved, signed by the Judge of the court who tried said cause, sealed, filed and made a part of the record in this cause, all of which is now accordingly done."

22 *Bill of Exceptions.*

Appellant's Term Bill of Exceptions saved by it to the denial of its application to remove this cause to the United States Court is as follows (caption omitted):

Term Bill of Exceptions.

Be it remembered, that on the third day of February, 1911, the plaintiff filed his petition in the office of the Clerk of the Circuit Court within and for Buchanan County, Missouri, at St. Joseph, wherein he prayed damages against the defendant named in said petition in the sum of one hundred thousand dollars ($100,000), and on said date had summons issued for the defendant therein

named, returnable to the May Term, 1911, of the Circuit Court of Buchanan County, Missouri; said petition is in words and figures as follows:

(See said petition as set out in the record proper herein, supra, page 1.)

Thereafter the said summons was regularly served upon the defendant, The St. Joseph & Grand Island Railway Company, and said defendant on the first day of May, 1911, and within the time allowed by law to it to plead to the petition of the plaintiff, and before filing answer or other pleading in said cause, filed in said cause its petition and bond as provided by law, praying that said cause be removed to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri. Said petition and bond are as follows:

(See said petition and bond as set out in the abstract of the Record Proper herein, supra, page 4.)

23 Thereafter, and at the May Term, 1911, of the Circuit Court of Buchanan County, Missouri, at St. Joseph, and on the twentieth day of May, 1911, said petition for removal came on for hearing, the parties, plaintiff and defendant appearing by their respective attorneys, and thereupon the court heard said petition for removal on belief of the defendant, the St. Joseph & Grand Island Railway Company, and after hearing said petition and the argument of counsel, the court took the same under advisement.

Thereafter, on the twenty-seventh day of May, 1911, and at the May Term, 1911, of said court, the court after considering said petition, denied the prayer therein contained, and over the objection of the defendant, refused to make an order transferring said cause to the United States Circuit Court as prayed in said petition, and entered therein the following order, in words and figures, as follows, to-wit:

21104

"RALPH W. MOORE
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY.

Now at this day come the parties to the above entitled cause by their respective attorneys, and the petition with bond for removal of this cause to the Circuit Court of the United States coming on to be heard, is at this time taken up and presented to the court, and the court being fully advised therein doth now here deny said petition."

Thereupon, and on the same day and at the same time the defendant, The St. Joseph & Grand Island Railway Company, objected and excepted to the action of the court in refusing to sustain said petition for removal and to transfer said cause as in said petition prayed.

24 And now on this 27th day of July, 1911, and at the regular May Term, 1911, aforesaid, of the Circuit Court aforesaid, and at and during the same term at which the foregoing proceedings

were had and entered, comes now the defendant, The St. Joseph & Grand Island Railway Company, and that the matters and things herein complained of may be made a matter of record in said cause, presents this, its bill of exceptions, which it prays may be signed, sealed, ordered filed and made a part of the record in said cause, which is accordingly done.

WM. D. RUSK,
Judge of the Circuit Court within and for Buchanan County, Missouri.

Appellant's Bill of Exceptions taken by it to the matters and things pertaining to the trial of said cause, and filed on February 27, 1913, as above stated, is as follows (captain omitted):

Trial Bill of Exceptions.

Be it remembered, that thereafter, and on the 15th day of February, A. D. 1912, the above entitled cause come on for hearing before the Honorable W. D. Rusk, Judge of the Division Number One of the Circuit Court of Buchanan County, Missouri, with a jury.

Messrs. Mytton and Parkinson, appearing as attorneys for the plaintiff; and

Mr. R. A. Brown and L. J. Eastin, appearing as attorneys for the defendant.

Thereupon the following proceedings were had and entered of record, to-wit:

25 RALPH W. MOORE, called as a witness in his own behalf, first being duly sworn, testified as follows:

Direct examination by Mr. Parkinson:

Q. Will you state your full name to the stenographer, please?
A. Ralph W. Moore.
Q. Mr. Moore, the idea is that these gentlemen way over here must hear you; these jurymen, must all hear you. Please talk loud so they will understand you. Where were you born, Ralph?
25½ A. St. Joseph, Missouri.
Q. What year?
A. 1888.
Q. 1888?
A. Yes, sir.
Q. And what month?
A. February 18th.
Q. February 18th, 1888?
A. Yes, sir.
Q. You are now then 24 years of age?
A. Yes, sir, almost.
Q. You were born here in St. Joseph?
A. Yes, sir.
Q. I wish you would look at this map, Mr. Moore, that is on the

floor, and marked Plaintiff's Exhibit A. I will ask you whether or not that correctly shows the location of the town of Marysville, Kansas, and the respective distances as given on the map are correct—the point where you were injured and the surroundings there?

A. It is.

Q. Was that map drawn from measurements made by——

A. (Interrupting.) By you and—Mr. Parkinson and myself.

Q. Would you tell the jury please what direction is this on the map? (Indicating.)

A. That is west on the railroad. North is the actual direction.

Q. Grand island is the western terminus of the Grand Island?

A. Yes, sir.

Q. And the railroad men refer to the north sometimes as west, is that correct?

A. Yes, sir; that is correct.

Q. And St. Joseph is the eastern terminus?

A. Yes, sir.

26 Q. And sometimes they refer to this as east? (Indicating.)

A. Yes, sir.

Q. And in reality it is directly south?

A. It is directly south.

Q. Would you tell the jury what this track represents?

A. It represents the main line.

Q. The main line track of the Grand Island running through the town of Marysville?

A. Yes, sir.

The Court: Now in saying "this track"——

Q. Indicating the west track. What does this represent, Mr. Moore? (Indicating.)

A. The depot platform.

Q. And by this I indicate the place marked "Depot platform" on the map. What is the distance from the north line of the depot platform to the switch-stand and switch point, which I indicate with the pointer, being the south end of the switch leading from the main track to the passing track?

A. Six hundred feet.

Q. Six hundred feet?

A. Yes, sir.

Q. The east track that I indicate with my pointer on the map is referred to as what track?

A. As the passing track.

Q. The passing track?

A. Yes, sir.

Q. And what do you call the track leading from the main track over to the passing track here? (Indicating.)

A. Some of them call it a cross-over, and others call it a cut-off.

Q. A cut-off?

A. Yes, sir.

27 Q. What switch is the one I indicate with my pointer, in connection with your injury? (Indicating.)

A. That is the switch that I was injured at, close to that.

Q. Now in which direction, on which side of the main line track is the switch stand which operated that switch?

A. It is on the left hand side. In other words, it is the east side.

Q. The east side?

A. Yes, sir.

Q. Of the main line track?

A. Of the main line track.

Q. What is the distance form the switch point as it leads off from the main line track to the joinder of the frog?

A. It is a distance of 86 feet.

Q. That frog is made by the east rail of the main line track, and the west rail of the cross-over track? The east rail of the main line track and the west rail of the cross-over track?

A. It is.

Q. Now what does this represent, this? (Indicating.)

A. It represents a bunch of coal sheds along there.

Q. And this track leading off here, what is it called? (Indicating.)

A. It is called the coal track.

Q. Do you know the name of the first street here?

A. No, sir! I do not.

Q. Do you know the name of the second street here?

A. No, sir; I don't know the name of that one.

Q. You don't know the name of that one?

A. No, sir.

28 Q. Now in whose employ were you on the 9th day of June, 1910?

A. In the employ of the St. Joseph & Grand Island Railway Company.

Q. And in what capacity?

A. A brakeman.

Q. A brakeman?

A. Yes, sir.

Q. What train were you a brakeman on?

A. I was braking that morning on train number 14 running from Marysville to Hiawatha.

Q. What time did you leave Marysville, Kansas?

A. I have to correct that. It was Hanover to Hiawatha.

Q. Hanover to Hiawatha. What time did you leave Hanover?

A. We was due out of there at 7:30.

Q. About what time was it when you were injured?

A. About 9:25 in the morning.

Q. About 9:25 in the morning?

A. Yes ,sir.

Q. Do you know how long you had been switching here in Marysville?

A. I could not state exactly, something like 25 or 30 minutes, and maybe more and maybe less.

Q. I here hand to the stenographer, Your Hornor, a stipulation,

which I ask to have marked as Plaintiff's Exhibit "B", and which I desire at this time to read to the jury.

Mr. Brown: No objection.

Mr. Parkinson: This stipulation was entered into between ourselves and Mr. Brown with reference to this matter so as to avoid delay before you in proving the facts.

Said paper marked Exhibit "B" was then read to the court and jury, and is as follows:

"In the Circuit Court of the State of Missouri within and for Buchanan County.

21104

RALPH W. MOORE, Plaintiff,
vs.
ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed by and between the parties hereto that train number 14 going east from Hanover, Kansas, on the morning of June 9th, 1910, at 7:30 o'clock, was the train upon which the plaintiff was a brakeman and working on said date, and that said train was carrying interstate shipments of merchandise, and that attached to said train and as a part of it running from Hanover east and through Marysville, were, among others, Grand Island car number 534 and Grand Island car number 8070; that both of said cars contained a number of shipments of merchandise being carried in interstate commerce from St. Joseph, Missouri, to towns in the State of Kansas.

This stipulation does not prevent either party from introducing further evidence concerning the facts stipulated about herein.

(Signed) MYTTON AND PARKINSON,
Att'ys for Plaintiff.

(Signed) R. A. BROWN,
Att'y for Defendant."

Q. What direction was the engine headed?

A. The engine was headed south.

Q. Towards the St. Joseph terminus of the railway?

A. Towards St. Joe.

Q. Where were the two cars that you were going in to connect with?

A. I could not say whether they were on the passing track or on one of the other tracks, but they were back in about the cut-over switch.

Q. By one of the other tracks, you mean there were other tracks, that lead off from this passing track?

A. There is.

Q. What two cars was it that you were going in to couple to at the time you were injured?

A. There was a car of cane seed.

Q. Do you remember the number of that car?
A. It was H. E. and W. T. 72.
Q. What was in that car?
A. Cane seed.
Q. What was its destination?
A. St. Joe.
Q. Missouri?
A. Missouri.
Q. What was the other car, Mr. Moore, if you remember, that was one of the two cars you were backing in to get?
A. That was one of the two.
Q. Do you know the number of the other car, Mr. Moore?
A. Union Pacific, 55636.
Q. Do you know what was in that car?
A. I think it was merchandise. It was a transfer from the Union Pacific.
Q. Were both of those cars transfers from the Union Pacific?
A. They were.
Q. Where were you going to put those cars when you got them and backed in?
A. Put them on the train.

Q. What was the destination of the second car that you
31 got from the Union Pacific, if you know, Mr. Moore?
A. I could not state positive whether it was St. Joe or not.

Q. Mr. Moore, how long had you been working with this particular engine, which crushed you?
A. About three or four days.
Q. What day of the week was it that you were injured?
A. It was on Thursday, the 9th day of June, 1910.
Q. Now what are the duties of a brakeman, Mr. Moore?
A. Their duties are to work with the train, do what the conductor tells you, switching and making up trains, unloading merchandise and other things, that is connected with the work in the train.
Q. What was this engine? What character of service were you working in, passenger or freight service?
A. I was working as a freight brakeman.
Q. What service was this engine being used in?
A. Used in freight service.
Q. Mr. Moore, what is the customary equipment of a freight engine, with reference to hose attachments on the rear of a freight engine?

31½ Q. Do you understand the question, Mr. Moore?
A. Why, the rear end equipment of a freight engine is a pair of grab-irons and one air hose; bell cord hose and steam hose are not supposed to be on the rear of freight engines.

Q. Now where is it customary to put—on which side of the tender as you face the back end of the tender is it customary
32 to put the air hose?
A. On the right hand side.

Q. And on which side, when occasion requires a switchman or brakeman to go behind a tender of an engine, is it customary

for a switchman or brakeman to stand in working with reference to the engine, on which side of the tender?

A. It is customary to step off on the left hand side.

Q. State whether or not——

The Court: Now I am confused about those two questions, and I am afraid the jury would be. In one I understood you to face one way, and in the other, the other way. If I am mistaken about that——

Mr. Parkinson: I know there will be no question about what I say being so. There are air hoses on every engine——

The Court: As Mr. Brown is objecting to that, he probably would not make any agreement about it.

Mr. Parkinson: I don't think he will object to my statement about the fact, as to the purpose of those hoses.

Mr. Brown: I would rather it would be shown in the evidence, rather than by the counsel.

The Court: You had better show it by the witness.

Q. What is the purpose and what function now does an air hose perform?

A. It is to couple the engine to the other car with air, connect them together, so that you can stop the train.

Q. Now where does that air operate so the jury will understand it?

A. It is operated from the engine.

32½ Q. I mean, what does the air operate? What back in the train, what does that air control?

A. It controls the train, the brakes.

Q. The brakes?

A. Yes, sir.

Q. That is where the brakes get their name, air-brakes, is it?

A. That is where it gets it.

Q. And the air is compressed by the pumps in the engine, and this hose attachment is the connection between the engine and the cars connected to it, whether freight or passenger cars, that works on the brakes on those cars, is that correct?

A. Yes, sir.

33 Q. Tell the jury, whether or not there were any hand-holds or grab-irons on the rear of the tender that you were working with that day?

A. There were no hand-holds or no grab-irons on the rear of the tank that I was working with that day.

Q. There were none at all?

A. There were none at all.

Q. Mr. Moore, state whether or not this engine was equipped with any coupler, automatic coupler designed to couple by impact with cars, and be uncoupled without the necessity of men going between them?

A. It was not.

Q. I say did it have on a coupler that had that purpose?

A. There was a coupler there for that purpose, but it would not work.

Q. How long had that coupler been out of condition?

A. It had been out of condition for two or three days.

33½ Q. Had you notified anybody about its condition?

A. I had told the conductor a day or so before that the coupler was not working, or in working order, and he says, "Well, we will have it fixed."

Q. What are the parts of that automatic coupler, so the jury will understand, what does it consist of?

A. It consists of a knuckle, fastened to the end of the draw bar, and a chain, a pin lifter, which is a part of the automatic coupler, a knuckle on the inside, so that when you raise the lever it throws the knuckle open; a pin lifter, a chain, a knuckle and a dog, is an automatic coupler.

Q. Where does this pin lifting rod run on the back of the tender, please?

A. It runs along, just on top of the draught timber of the tank. There is a handle on each end, sets just inside on the outside end of the draught timber, where you have to reach in to get a hold of it.

Q. On this particular engine what was the trouble with this automatic coupler?

A. A part of this automatic coupler, the pinlifting rod, which was a part of the automatic coupler, was sagged down in the center, and bent in towards the tank that when you raised it up, it made the chain longer, and sagging in the middle so it would not throw the knuckle open.

Q. That is, you mean the pinlifting rod was bent downwards and towards the tank in the center?

A. That is what I say. That is what I mean.

Q. How much did it sag down, would you say, would you estimate?

A. Well, I would estimate it now about nearly an inch and a half.

Q. Would the lifting of the rod open that knuckle?

A. It would not.

34 Q. How close was that—how was that pinlifting rod as you stand along the back end of the tender?

A. It was so close that a man with gloves on working could not grab his hand and grab ahold of it down on it. You could not get your hand down in it to grab it.

Q. What supported it? How was it supported along the rear of the tender?

A. It was supported with four—what you might call strap irons, fastened into the wood, with a little round loop on top, and the rod runs through it.

Q. Now state whether or not that was out three or four inches from the tender, so that you could grab ahold of it with your hands?

A. It was not.

Q. Are you positive about that?

A. I am positive of it.

Q. State whether or not this coupler could be worked from
35 the outside, or side of the tender?

A. It could not.

Q. Now state what was the custom of brakemen and switchmen in performing their work, with reference to wearing gloves at that kind of work?

A. Well, it is customary for all of them to wear gloves, for it is rough work, and grabbing irons, you are liable to smash your hands up.

Q. How long, Mr. Moore, had you been working in Marysville that morning, or do you remember?

A. Why, it might have been 25 or 30 minutes and might have been more, and might have been less. I could not state exactly.

Q. Prior to the time that this engine was backed up, and you were injured, where had the engine been?

A. The engine had come from the north.

Q. Came from this direction? (Indicating.)

A. Yes, sir.

Q. Where had it been just before it come from the north, where had it been?

A. We had made a flying switch of two cars ahead of us. We wanted to put the two cars into the cut-over, and wanted the engine to go down the main line.

Q. So the jury will understand, when you went to make this drop that you speak of, your engine was headed to the south?

A. The engine was headed to the south.

Q. And ahead of the engine were these two cars?

A. The two cars.

Q. They were coupled onto this engine onto that cow-catcher—what do you call that?

A. Why, it is the pilot, but it has a coupler on it just the same as the car.

36 Q. Then you left them and the engine after those two cars had been up here,—and then where were you standing?

A. At that time I was stationed at the main line switch, at the cross over.

Q. There? (Indicating.)

A. There.

Q. Now then when this engine and these two cars started to back down to the north, which way was the switch thrown?

A. It was lined up for the main line.

Q. Now where were the engine and the cars separated, where were they separated?

A. They were separated some distance between that cross street there, and the switch. (Indicating.)

Q. They were separated up in here? (Indicating.)

A. Yes, sir.

Q. Now which traveled faster? State whether or not the engine traveled faster than the cars, and ahead of the cars in making the drop?

A. Well, they would be ahead of them in one way.

Q. I mean, state whether or not the engine parted from the cars and backed faster than the cars ran?

A. The engine would have to give the cars a start, an awful start, had to slack them so you could pull the pin to couple the engine loose from the cars, then slack up to get out of the road of the switch, so as I could throw the switch to leave the cars go in over the cross-over.

Q. You turned that switch?

A. Yes, sir.

Q. Wait a moment. In making that movement, who uncoupled that engine from the cars?

A. I believe it was the conductor.

Q. What is his name?

A. Mr. Pigg.

37 Q. Now, where did the engine go, what direction,—where did the engine go, back up?

A. The engine went north of the switch.

Q. On which line?

A. On the main line.

Q. The engine backed up and still headed to the south?

A. Still headed to the south.

Q. After the engine passed over this switch point, state whether or not you did anything to the switch?

Q. And how did that line the track up?

A. It lined up for the cross over.

Q. For the cross over?

A. Yes, sir.

Q. Now where did the cars go?

A. The cars went back to the cross over.

Q. Back here? (Indicating.)

A. On to one of those tracks.

Q. Back in here?

A. Yes, sir.

Q. Those two cars?

A. Yes, sir.

38 Q. Now after the cars had gone back in here, what, if anything, did you do at that time?

A. Well, when I saw the cars were in the clear, so the engine could come up the main line, I signalled the fireman and the engineer, both could see, to come ahead.

Q. Well, when you signalled to come ahead, you mean come from the main line back here, north? (Indicating.)

A. I do.

The Court: South?

Mr. Parkinson: Go south, yes. Come from the north. And did you see the conductor before this engine came north?

A. Yes, sir; I did.

Q. What did he do and where did he go?

A. He walked across the track just a little ways ahead of the engine, over to my side.

Q. You mean before the engine came up here, he walked from where?
A. He walked from the west side of the main line.
Q. From the west side over here?
A. To the east side of the main line.
Q. And where with reference to the switch stand?
A. About eight to ten feet south of the cross-over switch stand.
Q. He passed down here, did he? (Indicating.)
A. Yes sir; down there. (Indicating.)
Q. Now was there anyone else there?
A. Why, Mr. Miller, the section foreman, was there with him.
Q. Now where did the engine stop when it came up here?
A. The engine stopped with the wheels just in the clear over the switch point.
Q. You mean the rear wheels of the tender was there just
39 clear of the switch point?
A. Yes, sir; just clear of the switch point, so the switch point, so the switch could be thrown.
Q. I do not want to repeat, but the engine was still facing south?
A. The engine was still facing to the south.
Q. Now state whether or not it came to a stop?
A. It came to a stop.
Q. Now what did you do then?
A. I throwed the switch.
Q. Then what did you do?
A. I walked up to the tank and jerked up on the lever.
Q. Now what lever do you mean, what have you called that?
A. The pin-lifter rod, that runs across so you can work the knuckle.
Q. Did the knuckle work?
A. It refused to work.
Q. What did you do then?
A. I stepped on the inside to open it with my hand.
Q. And what do you mean, that you stepped on the outside of now?
A. I stepped on the inside of the track behind.
Q. Of which track?
A. Of the main line and the cross-over.
Q. You mean you stepped right in there? (Indicating.)
A. Right in there, yes, sir. (Indicating.)
Q. Now when you stepped in there, the time you stepped in there, was the engine standing or moving?
A. The engine was stationary, then.
40 Q. Did you give any signal? State whether or not you gave any signal to control the movement of that train?
A. I absolutely did not give any signal.
Q. Prior to stepping in there?
A. Prior to stepping in there.
Q. When you stepped in there what was your purpose in going in there?
A. To open the knuckle so as to couple on to the cars.

Q. Now, what happened when you were there, tell what took place?

A. I went in to open the knuckle. While I was in there the engine started to back, the steam hose, swung out, tripped me,—I tried to get away, to back out, I looked to grab for the grab-irons when I saw I was falling, and there was none there; just then I grabbed—whether I grabbed the bell cord hose or the air hose, I could not say, but I grabbed something there.

Q. Which hand did you grab with?

A. I grabbed with my right hand; I grabbed and swung around like this, hanging on all the time, (indicating) and when I came down with my hand, and grabbed the rail.

Q. Which hand did you grab the rail with?

A. I grabbed the rail with my left hand.

41 Q. Now, Mr. Moore, what hand did you grab the rail of the track with?

A. With my left hand.

Q. Will you tell the jury what rail it was you grabbed with your left hand?

A. I can point to the rail there.

Q. Shall I point to it for you? Just place it where you want it.

A. This rail right here. (Indicating on plat.)

Q. That would be the west rail of the cross-over track, is that correct, Mr. Brown?

A. That is what it would be.

Mr. Brown: I don't know, Mr. Parkinson.

Mr. Parkinson: I want you to see to put it correctly. That is the west rail of the cross-over track. Then what happened, what did you do, if anything?

A. Well, when I saw I was gone, I was already there, and I went down, and I hollered "stop him." I felt it cut my hand off and after my hand was cut off I held as long as I could and hung right on, it drug me, and I could not say exactly how far I went that way, but before that I heard someone else holler,—I could not say what they hollered, or who it was that hollered, but I had to let loose, I could not hold no longer, and after that I could not state definitely.

Q. What effect did the movement of the engine have on the steam hose?

A. It made the steam hose swing between your feet and against your feet, in your road, and cause you to trip.

Q. What is the object of the grab-iron, Mr. Moore, on the rear end of the tender?

A. The grab-iron at the rear end of the tender and at the rear of cars are for the safety of brakemen and employees in

42 coupling and uncoupling cars, for to grab to in case of accident of any kind.

Q. Where did they take you after you were taken out from under the engine, Mr. Moore?

A. They said they took me to some house there, what they called an emergency hospital.

Q. You don't know just where you were taken to?
A. Not exactly; no, sir.
Q. What is the next thing you remember of their doing with you, please, Ralph?
A. Well, I don't remember much about what they did with me. I was in such a critical condition and hurt so bad.
Q. Do you remember of the trip being made to St. Joseph?
A. I believe I remember something about them putting on a way car and bringing me to St. Joe.
Q. Do you remember where you were taken when you got to St. Joseph?
A. I only remember of getting in the ambulance, them putting me in the ambulance.
Q. Do you remember what hospital you were taken to?
A. I was taken to the Sisters Hospital.
Q. Now what physican waited on you and operated on you here in St Joseph?
A. Why, there were three physicians that operated on me.
Q. Who was in charge?
A. Why, I could not say whether Dr. Wallace or Dr. Hansen.
Q. Who was your physician?
A. Dr. Hansen is my family doctor.
Q. Do you remember what day it was they took you to the hospital or when?
A. They took me on the 9th day of June.
43 Q. How long did you remain in the hospital?
A. I remained in the hospital until the 23rd day of July.
Q. Until the 23rd day of July?
A. Yes.
Q. And while you were being taken from the engine, or while you were at the hospital, state whether or not you suffered any pain?
A. I suffered an awful lot of pain, gentlemen, an awful lot.
Q. State whether or not you still suffer?
A. And I still suffer. I can feel my fingers when there is anything up against them—when it is wrapped up you feel your fingers all the time. I have here a leg with no muscle on it that hurts. (Indicating.)
Q. How much shorter is that leg, Mr. Moore, than the other one?
A. This left leg is 2½ inches shorter than the right here.
Q. And on which side of the leg is the muscle gone?
A. It is on the left side in here that are gone. (Thereupon the mother of the plaintiff, Mrs. Moore, removed the clothing from Mr. Moore's arms and legs, and his arms were exhibited to the jury.)

Mr. Parkinson: I would like to see his limb, too. (Thereupon the boy's leg was exhibited to the jury.)
Mr. Parkinson: Will you turn around, Mr. Moore, so the jury can see? Where are the muscles gone, please?

A. The muscles are gone from here to the ankle. Those muscles. (Indicating.) I cannot raise my foot up like that at all. That is all I can move it.

Mr. Parkinson: Take the other one off so I can show the difference in the leg, please.

44 (Thereupon Mr. Moore took clothing from other limb.)

Mr. Parkinson: Now, will you stand up, Mr. Moore, will you turn around so the jury can see it, please? (Exhibits to jury.) Turn clear around so they can see the size of the leg from behind. State whether or not your limb pains you, Mr. Moore.

A. My limb does pain me. It pains me all the time, every night, especially in a change of weather and any time it hurts all the time.

Mr. Brown: Won't he take cold?

Mr. Parkinson: No, I think not, Mr. Brown. The skin has healed over there. Mr. Moore, who feeds you, how are you fed?

A. My mother has to feed me, has to dress me, comb my hair, wash my face, take me to the toilet, because I cannot do nothing myself.

Q. Is there anything, any kind or character of work that you can do? Are you able to do anything, Mr. Moore?

A. I don't know of anything that I can do. I have not done anything since I have been hurt; there is nothing that I can do.

Q. Do you care to have your coat on?

A. It does not matter to me, Mr. Parkinson.

Q. Mr. Moore, how long were you in the hospital?

A. Forty-four days it figures.

Q. What treatment was given to you to alleviate your suffering?

A. Morphine.

Q. How often was it administered, Mr. Moore?

A. At times I got it every two hours. I believe there were times I got it a little oftener than that. I could not say exactly.

45 Q. How long did that continue?

A. Well, that was continued for about three weeks or more; the first three weeks.

Q. When did you leave the hospital?

A. The 23rd day of July.

Q. Where were you taken then, Mr. Moore?

A. I was taken to my home, 15th and Sacramento.

Q. And where are you living now?

A. 1424 Sacramento.

Q. With whom?

A. With my mother.

Q. Since your injury have you been able to do anything to contribute to the support of yourself?

A. I have not been able to do anything since I have been hurt, or to care for myself in no way.

Q. How is your rest at night, Mr. Moore?

A. It is not much rest. I can't sleep, I am nervous and roll constantly.

Q. How constantly do you feel the pain in your hands?

A. I can feel it pretty near all the time.

Q. And how about your leg, Mr. Moore?

A. It hurts, especially when I walk on it—it is so short that I got on one side and cannot hardly walk; it hits like, and turns over; if I

hit any little lump on the street, I flop over. I cannot control it at all.

Q. To what extent are you able to use it in taking journeys? To what extent are you able to use it in reference to the length of time?

A. Not very long. If I walk uptown I cannot walk home with it.

Q. Now, Mr. Moore, what was the condition of your health prior to your injury?

46 A. My health before I was hurt was perfect. I never knew what it was to have a doctor or to be sick.

Q. Were you in perfect health up until that time?

A. I was in perfect health up to the time I met with my accident.

Q. How long have you been in the employ of the Grand Island, prior to your injury?

A. I went to work for the Grand Island Railroad on August 5th, 1909.

Q. And you worked from August 5th, 1909, up to June, 1910, in what capacity?

A. Freight brakeman.

Q. Freight brakeman during that time?

A. Yes, sir.

Q. Where have you worked prior to that time?

A. I worked for the Union Pacific.

Q. What did you do for them?

A. Just before I came with the Grand Island I was a brakeman on the Union Pacific.

Q. Do you remember how long?

A. Well, I could not state exactly, no.

Q. Did you ever work for anybody else before that?

A. Not as a brakeman.

Q. Who did you work — before that time? Well, how long have you been working altogether, Ralph, railroading, before you were injured?

A. A year and a half or two years.

Q. What wages were you getting at the time you were injured?

A. I was making all the way from $75 to $100 a month.

47 Q. Do you know—has Dr. Hansen rendered you his bill yet for his services or not?

A. He has not sent me the bill yet.

Q. You don't know what his charges are?

A. I don't know what his charges are.

Q. Have you paid him anything on that bill yet?

A. I have not paid him anything yet, because I have not had anything to pay him.

Q. Have you paid the drug bills or any of those bills?

A. Only just a few small ones since then I have paid myself.

Thereupon court took a recess until 1:30 p. m.

Afternoon Session of Court, February 16th, 1912, Before Judge Rusk, and a jury.

The Court: If there are any witnesses in the court room, they must leave the court room, whether subpœnaed or not. They must report to the court, anyone here who expects to testify in this case.

Cross-examination by Mr. Brown:

Q. Mr. Moore, you say you had been employed by the Union Pacific Railroad Company, for some time prior to the time you accepted employment from the Grand Island Railway Company?

A. Yes, sir.

Q. And you were familiar with the usual customs that pertained to the operation of freight trains, were you?

A. I think I was; yes, sir.

Q. And you were fully acquainted with the hazards of the employment that you were engaged in, were you?

A. The which?

48 Q. The hazards, the dangers of the employment?

A. Yes, sir; I was.

Q. When you were employed by the Grand Island Company, did they give you any book of rules to govern your conduct in your work for the company?

A. When I went to work for them?

Q. Yes, sir.

A. No, sir; they did not.

Q. How soon thereafter did they give you a book of rules?

A. About thirty days before my accident; I think it was May 15th, that the rule books were issued.

Q. May 15th that the rule books were issued?

A. I think that was the time.

Q. Well, did you get a book at that time?

A. I did then; yes, sir.

Q. Were you required to pass an examination as to whether you understood the contents of the book?

A. I was not; no, sir.

Q. Did you ever stand any examination before Mr. A. I. Woodruff?

A. No, sir; I did not.

Q. The examiner?

A. No, sir.

Q. You say you did not?

A. I say I did not.

Q. You never were examined by anybody?

A. Yes, sir; I was.

Q. Who?

A. I was examined by Mr. Tansell.

Q. By Mr. Tansell?

A. Yes, sir.

Q. Examined as to your knowledge of the contents of the book of rules?

A. No, sir.

49 Q. What were you examined about then?

A. I was examined by Mr. Tansell, when I hired out to them as a brakeman.

Q. Examined by him how?

A. I was examined by him for a brakeman.

Q. Well, what for, or how were you examined?

A. I was examined on their rules.

Q. That is what I am asking you about, were you examined on their rules at that time?

A. I was at the time I was hired out to them; yes, sir.

Q. You passed your examination, did you not?

A. Yes, sir; I did.

Q. Did you familiarize yourself with the rules of the company in the book that was given to you as you say some time before you were injured?

A. Well, I don't know as I did, because I was not called on for to take any examination out of the book. I just took the book; it was customary for a brakeman to sign up for these books.

Q. I will ask you if on April 14th, 1910, Mr. A. I. Woodruff examined you, and gave to the St. Joseph & Grand Island Railway Company in your presence the certificate that I hand you as to your having passed an examination of the contents of the book of rules at that time?

—. ——.

50 Q. I just ask you—I will hold the certificate for you and ask you to look at it.

A. He never examined me. He might have instructed me, but he never gave me a thorough examination on the book of rules.

Q. Do you know Mr. Woodruff?

A. I don't believe I would know the man if I would see him now.

Q. Do you remember a man by the name of Woodruff?

A. I remember a man by that name; yes, sir.

Q. Did he instruct you?

A. He did not instruct me alone; no, sir.

Q. Did he instruct you?

A. Not me alone.

Q. Did he instruct you?

A. Did he instruct me alone?

Q. I did not ask you that; I just asked you if he instructed you.

A. Why, he instructed—he did not really instruct—a bunch of us in the way car; but he just stated a few things and asked our opinion about them; just orally in a way car according to the book of rules that was to be issued May 15th.

Q. He pointed out things in a book of rules, did he?

A. He did.

Q. That was to be issued and asked you if you understood it?

A. He asked if I understood it; yes, sir.

51 Q. Did you tell him you did?

A. I told him I understood what he told me; yes, sir.

Q. You understood what you saw and he read to you, didn't you?

A. Well, yes, I did.

Q. Well, then as a matter of fact, Mr. Woodruff did instruct you and you answered the questions and you told him you understood the questions that were asked you, didn't you?

A. Well, I was not asked no questions separately. I was just asked in a body.

Q. I did not ask you whether it was in a body or whether it was separately. I just simply asked you if you were examined. You were examined with others, were you?

A. I was instructed with others or told about some things that they had taken up, that they had not been used to having in their movement of trains.

Q. That was on the 11th day of April, 1910?

A. I don't so say whether it was or not.

Q. What is your best recollection?

A. To tell you the truth I have no recollection of what the date was.

Q. It may have been as early as January, 1910?

A. I could not say when it was.

Q. May it have been within thirty days after you were employed?

A. Within which?

Q. Within thirty days after you were employed?

A. I could state that it was not that close; no, sir.

Q. It was not that close?

A. No, sir.

Q. Was it within sixty days after you were employed?

A. Sixty days? It was not that soon.

52 Q. It was not that soon?

A. No, sir.

Q. Was a book containing the rules of the Grand Island Company afterwards delivered to you?

A. There was; yes, sir.

Q. When was that book of rules delivered to you?

A. Mr. Brown, I could not say when it was delivered to me.

Q. Those were revised rules, were they not, a new book of rules?

A. Well, they was called a book of standard rules.

Q. And they were effective May 15th, 1910, were they not?

A. Yes, sir; they were.

Q. And this was given to you prior to that time, was it not, and you passed this examination way back in April on this book of rules?

A. Well, I could not say whether I passed it in April or not.

Q. But whenever you did have that examination and whatever was done, it was relating to this book of rules that you were examined about at that time?

A. I could not say whether it was or not.

Q. Didn't you just a while ago tell the jury that he examined you about some rules to become effective April 15th?

A. He instructed on a few special points, special rules that had

not been used in the movement of the Grand Island trains, was what he informed us on.

Q. To be effective May 15th?

A. May 15th; yes, sir.

Q. Had you had rules prior to that time?

A. No, sir; I had not no written rules; no, sir.

Q. No written rules at that time?

A. No, sir.

53 Q. You had bulletins that were posted up, did you not?

A. I never saw no bulletins posted for brakemen.

Q. You don't know whether there were any or not?

A. There was bulletins the conductors would tell us about; if there was anything wrong about a switch, or switch spiked or anything, there was bulletins issued and the conductor would notify the brakemen.

Q. I wish you would look at the book marked Defendant's Exhibit 1 and tell the jury if you received a book similar to that one?

A. I have a book, the same writing on the outside, or practically the same as that one; yes, sir.

Q. You have that book now, haven't you?

A. I have a book at home; yes, sir.

Q. It is at your home, the one that you have?

A. At my home; yes, sir.

Q. Did you ever read it?

A. Not that I know of; no, sir.

Q. Never read the book that they gave you at all?

A. No, sir; I looked at it, looked through it; I never read anything particular in it; no, sir.

Q. Do you know what it was given to you for?

A. It was given to me so that if I did not know anything I could look into it and find it.

Q. It was given to you to govern your actions accordingly, according to the rules in the book, was it not, and you were so instructed, were you not?

A. How is the question?

Q. I say it was given to you for the purpose of governing your actions with the company, was it not, and that if you did not

54 know to read the book and to ascertain?

A. It was not particularly given to you to govern your actions; it was given to you to know the different signals and the movement of trains. There was no special action in there what a person should do in action.

Q. There was not anything said in the book about whether you should go in between the trains or not, was there?

A. Not as I ever saw; no, sir.

Q. You never saw that, did you?

A. No, sir; I did not.

Q. Then you did not read your book, did you, that was given to you by the company?

A. It was not given to me to read clear through, Mr. Brown.

Q. What was it for? Have you any idea what it was for, what

the contents of it was for, if it was not to read? It says: "Rules and Regulations" on the outside of it; "St. Joseph & Grand Island Railway Company, Rules and Regulations of the Transportation Department, and effective May 15th, 1910"?

A. That is what it says.

Q. You were in the transportation department, operation of trains?

A. Yes, sir.

Q. And this book was intended to govern your actions, wasn't it?

A. My actions?

Q. Yes, sir; your conduct when employed by the company?

A. To a certain extent; yes, sir.

Q. When you entered the employment of the company did you at that time, sign the paper marked Defendant's Exhibit 2? (Exhibiting paper to witness.)

A. I signed that application; yes, sir.

Q. That is your signature, isn't it?

A. Yes, sir.

55 Q. And that is your writing on there where it is filled out?

A. Yes, sir.

Q. You filled that out in your own handwriting, didn't you?

A. Yes, sir.

Q. Now on that date, on the 4th day of August, 1909, you acknowledge and received a copy of the rules and regulations for the government of employes, didn't you?

A. I received that application, but I never received no book of rules, and no instructions when I went to work for the St. Joe and Grand Island. All I received was when I went to the yard office,—I was sent down there with a letter,—and I received two switch keys.

Q. Well, in any event you did receive the book then?

A. Letter.

Q. Letter?

A. Yes, sir.

Q. Had you ever worked with this engine prior to the trip that you were on when injured?

A. The trip?

Q. Yes, sir; this trip out from St. Joseph?

A. I had worked that week with the engine.

Q. You had worked that week with it?

A. Yes, sir.

Q. And on what day were you injured, what day of the week?

A. I was injured on June 19th, 1910, on Thursday.

Q. On Thursday?

A. Yes, sir.

Q. You had worked all of that day with it?

A. That part of a day.

Q. I mean all of that week with it?

A. I think we had, Mr. Brown.

56 Q. Where did you start in with the engine, where did you get it?
A. I got the engine at Hiawatha.
Q. At Hiawatha?
A. Yes, sir.
Q. And on what day, do you remember?
A. We got the engine on Monday morning.
Q. Do you know whether that engine had gone to Kansas City with a passenger train and came back with a freight train?
A. I could not state; no, sir; not being in St. Joe, I don't know.
Q. You don't know about that?
A. No, sir.
Q. Who was the train crew; that is, who were the members of the train crew that were with you?
A. On that day of my accident?
Q. On the train, that is, the train crew at the time you were injured?
A. There was Conductor Pigg, Brakeman Coy, Brakeman Shepherd, Fireman Temps, Engineer Hawkins and myself.
Q. Had they been with you all the week?
A. They had; yes, sir.
Q. Been with that engine all the time you had been with it?
A. Been on the train; yes, sir; all week with me; yes, sir.
Q. Had you ever had that engine out before on any other occasion?
A. I could not state that I had, Mr. Brown.
Q. Do you know whether you had or not?
A. No, I could not say that I had.
Q. What was the number of the engine?
A. 45.
57 Q. And you tell the jury now that you have no recollection as to ever having worked around that engine before?
A. I have no actual knowledge of working around it; no, sir.
Q. What is your recollection on that subject?
A. The best recollection of remembering the engine?
Q. Yes, sir.
A. I have no recollection of remembering the engine.
Q. None whatever? The Grand Island did not have many engines, did it?
A. I could not state that either, Mr. Brown.
Q. What other engines have you worked around on the Grand Island road?
A. I was in a rear end collision on one of their compound engines.
Q. Compound engines?
A. Yes, sir.
Q. When was that?
A. September, 1909, the 2nd day of September.
Q. How many engines do you know that you worked around?
A. Oh, I have worked around several.
Q. What do you mean by several, about how many?
A. More than two.

Q. More than two?
A. Yes, sir.
Q. And less than ten?
A. I could not say; maybe I have worked with ten and maybe I have not.
Q. During all the period of time that you worked for the Grand Island Company, you cannot tell the jury that you ever worked with more than ten engines, can you?
A. Why, I would not want to say and then have it produced to me that I had not, when I am not positive as to how many
58 engines I have worked with.
Q. Did you come in as far as from Grand Island with this train?
A. No, sir.
Q. From Hanover?
A. Yes, sir.
Q. You had not been out to Grand Island at all, I mean on that trip?
A. No, sir; not on that trip.
Q. When you came into Marysville you came in from the west, or more correctly speaking, through the town of Marysville you came in from the north, didn't you?
A. I did; yes, sir.
Q. Now, as I understand you, you had some cars in front of the engine?
A. Yes, sir; we did.
Q. That you wanted to put behind the engine, is that right?
A. That is correct.
Q. So that you brought the cars up past the switch, across the point where you were injured, and went past that switch, you were on the main line, were you?
A. The train was; yes, sir; on the main line.
Q. The engine and box cars and the tender came in on the main line going south, didn't they?
A. You mean when we first come to town?
Q. I mean when you were shooting these box cars or changing the box cars?
A. When we were switching?
Q. Switching.
A. Yes, there was two cars ahead of the engine; yes, sir.
Q. And I say you were on the main line or west line?
A. On the main line; yes, sir.
59 Q. And after you passed over the point of the switch and went down here, (indicating on plat on floor), you started back with these cars, is that right?
A. We started to make the drop of them.
Q. So the jury may understand it, you started back on the main track with them, didn't you?
A. We started to make a drop with them; yes, sir.
Q. And did you start back on the main line?

A. We had to start back to make a drop.

Mr. Parkinson: We object to that question. Mr. Brown knows that he was not with the cars, and it is not a fair question. Mr. Brown knows that he was not with the cars.

Q. I say they came back with the cars on the main track, whoever it was, did they not? Is that right, Mr. Moore?

A. The engine came back with the cars; yes, sir.

Q. On the main track?

A. On the main line; yes, sir.

Q. That was what I was asking you, was all. And when the engine came down past the point of the switch, you had the switch set so that the engine would run back down the main track, did you?

A. I did; yes, sir.

Q. And after the engine was cut loose from those two cars, the engine passed you and went north on the main track, you then threw the switch and threw the two cars off on to the cut off?

A. I did; yes, sir.

Q. And after the engine was cut loose from those two cars, the engine passed you and went north on the main track, you then threw the switch and threw the two cars off on to the cut off?

60 A. I did; yes, sir.

Q. And after those two cars had gone on north or west and had been spotted or set down here further somewhere, then the engine started back south and passed over the switch again, is that right?

A. Just over the switch, just in the clear.

Q. Past over the switch and you threw it?

A. Just over the switch so the wheels were just over the switch so you could throw it.

Q. Did it have to pass over the switch?

A. It would have to pass over the switch so I could throw it.

Q. I say, it did pass over the switch?

A. I say it just passed over the switch in the clear.

Q. Then it was over the switch?

A. Yes, sir; certainly.

Q. Then answer the question, so it passed over the switch, and stopped somewhere south of the switch?

A. It just stopped in the clear of the switch points.

Q. That was south of the switch?

A. Yes, sir.

Q. Now then, after the engine and the tender—there was nothing there but the engine and the tender?

A. No cars; there was not; no, sir.

Q. Nothing there but the engine and the tender?

A. The engine and tender; yes, sir.

Q. And while they were standing there you threw the switch so that the engine could back down on the cut-off or the cross-over track and pick up these cars on the rear end of the engine or tender, didn't you?

A. Yes, sir; I did.

61 Q. Now, do I understand you to tell the jury that after you had thrown the switch that you then went to the end of the tender and took hold of the lever to draw the pin and throw the knuckle open so it would couple on to the cars down here? (Indicating on the plat.)

A. I did; yes, sir.

Q. And you took hold of the lever at the side of the tender, did you?

A. At the back end of the tender; yes, sir.

Q. That was at one corner of it, was it not?

A. Well, it sets in, Mr. Brown.

Q. Well, it sets in a little, but then it is at the corner of the tender practically, isn't it?

A. It is at the back end of the tender; yes, sir.

Q. And you tried it and it would not work?

A. It did not; yes, sir.

Q. Well, it would not work, would it?

A. It would not work; no, sir.

Q. And it had been in that condition for some days, hadn't it?

A. Yes, sir: it had.

Q. And it would not work at all during those days?

A. No, sir; it didn't.

Q. Why did you go and try to work it that time, if you knew it would not work?

A. Because it is customary for all brakemen and trainmen to take hold of the lever to open the knuckle.

Q. But you know it had not been working all the time you were out with it?

A. Yes, sir; that is all right; it is customary to do that, and if it don't open to go in and open it.

62 Q. I was just asking you if you knew all the time you were out it would not open?

A. I knew it would not work; yes, sir.

Q. And notwithstanding the knowledge you had that it would not work, you went up and took hold of it and tried to open it with the lever?

A. Yes, sir; I did.

Q. And then when you found it would not open with the lever you walked in behind the tender and undertook to open it with your hands?

A. Yes, sir; I did.

Q. That is, to open the knuckle with your hands?

A. Yes, sir.

Q. And the engine was standing still, wasn't it?

A. The engine was perfectly still.

Q. At that time. And while you were in there trying to open the knuckle the engineer backed the engine over you, didn't he?

A. He backed it against me; yes, sir.

Q. Well, backed it over your hands, didn't he? The tender wheels went over your hands, didn't they?

A. The tender; yes, sir.
Q. Whose duty was it to give a signal when the engine was to back up, after you had thrown the switch, whose duty was it?
A. It was my duty.
Q. And the duty of no one else, was it?
A. And no one else.
Q. No one else to give the signal?
A. No, sir.
Q. And you had not given a signal, had you?
A. I had not given a signal.
63 Q. You had not given a signal?
A. No, sir.
Q. But you had the switch thrown and then you walked in behind the tender and without a signal they backed up on you?
A. They did; yes, sir.
Q. That was south of the switch when they backed on you, was it, just south of the switch?
A. No, sir; it was not.
Q. I thought you told the jury that the rear end of the tender stood south of the switch stand?
A. I never told the jury that; no, sir.
Q. I thought you said that the train went far enough south, the engine and the tender, so that they barely passed over the end of the switch?
A. I told the jury that the wheels stopped just in the clear of the switch, and that would throw the tank back over on to the switch.
Q. You tell the jury now, don't you, that the wheels did go far enough to clear the switch points?
A. It had to go far enough to throw the switch.
Q. You could not throw the switch otherwise?
A. Unless the wheels went over the points of it.
Q. Then while it was in that position, where ever it may have been, while in that position, he backed the engine, didn't her?
A. He did when I was behind it.
Q. And that threw you down or you were thrown down?
A. Yes, sir.
Q. Don't you know that the rear end of the tender stood
64 out there anywhere from thirty to fifty feet south of the switch?
A. How is that question?
Q. Don't you know that the rear end of the tender stood out here from fifty, to sixty or seventy-five feet south of the switch-stand, where you stood?
A. It absolutely did not.
Q. It did not?
A. No, sir.
Q. So you are just as positive about that as of anything else you have sworn to, are you not?
A. Why, I have no reason to be otherwise.
Q. I say you are, are you not?

A. I am positive it was just over the switch points.

Q. And how far do you say it was north of the switch-stand that you fell, do you know?

A. I could not say how far it is, Mr. Brown.

Q. You don't know how far it is that you fell?

A. No, sir; I do not exactly.

Q. You did not stand there by the switch stand and signal the fireman, did you, to back up?

A. No, sir; I never signalled him to back up.

Q. And you did not wait there until the tender came up, and jump upon the ladder on the side of the tender, did you?

A. No, sir; I did not jump on no ladder on the side of the tender.

Q. You did not get on that tender at all, did you?

A. No, sir; I did not.

Q. You did not get on the tender and take hold of the lever and open the knuckle, did you?

A. I absolutely did not.

Q. On the tender? You did not do anything of that kind?

A. No, sir.

Q. Did you see Mr. Pigg, the conductor in charge of that train, and the section foreman, Mr. Miller, standing near the switch
65 there?

A. I saw them standing south of the switch; yes, sir.

Q. Well, south of the switch. How many feet south of the switch do you say they were?

A. I should judge eight or ten feet south.

Q. They were not north of the switch?

A. How?

Q. They were not north of the switch?

A. I did not see them north of the switch.

Q. In other words, you think they were so far south that they could not see the rear end of the tender at all, don't you think that is true?

A. I don't see how they could see the rear end of the tender.

Q. That was what I was getting at. You think they were standing so far south that they could not see what you were doing behind the tender?

A. That is what I think.

Q. That is what you think?

A. Yes, sir.

Q. And they were not standing north of the switch at all, were they?

A. No, sir; they were not.

Q. And you did not in their presence jump up on the tender as it passed by you, did you?

A. No, sir; I did not.

Q. The fireman could look out of that window and see all along the side of the tender, could he not?

A. He could; yes, sir.

Q. And you never done that in the presence of the fireman on the engine, did you?

A. No, sir; I never jumped on the side of the tender.
Q. You did not jump on the rear of the tender at all, did you?
A. No, sir; I did not.
66 Q. Or any part of the tender?
A. No, sir.
Q. You did not do that, did you?
A. No, sir.
Q. And you did not undertake to pass behind the tender and cross over to the other side, did you, behind it?
A. No, sir; I did not.
Q. While it was moving?
A. No, sir.
Q. Now you are an experienced brakeman, aren't you?
A. I was then, Mr. Brown; yes, sir.
Q. I mean you were then an experienced brakeman?
A. Yes, sir.
Q. Isn't it customary for brakemen or switchmen working around an engine to work as much as possible on the engineer's side?
A. Why, it is not necessarily when you are switching in the level yards, whether you are on the engineer's side or the fireman's side.
Q. That is not the question I asked you, whether it was necessary or not. I asked you, if it was not generally customary for switchmen to work on the engineer's side, so that the engineer can get your signal? That is the usual custom, is it not, for switchmen?
A. Why, it is customary in a way to work on the engineer's side, if it is convenient on that side; if it is not, it is customary to work on the fireman's side.
Q. There was not anything to make it inconvenient to work on the engineer's side, was there?
A. Yes, sir; that was on the other side.
Q. And there was not anything after you got through on the other side to make it inconvenient for you to work on the engineer's side after that time, was there?
A. I could have went over there; yes, sir.
67 Q. That is what I was getting at,—because the engineer was on the right hand side, wasn't he—of the engine?
A. With the engine facing south; yes, sir.
Q. With the engine facing south, he was on the right hand side?
A. Yes, sir.
Q. And the engine facing any direction the engineer was on the right hand side, was he not?
A. Yes, sir.
Q. And before the engineer could get a signal when you work on the left hand side, you have to give your signal to the fireman and then he transmits it to the engineer, doesn't he?
A. Yes, sir.
Q. And for that reason it is generally customary for trainmen or flagmen or switchmen to work on the engineer's side, when it is convenient, isn't it?
A. Well, the trainmen would rather trust an engineer with a

signal than they would a fireman, for the firemen, there is not half of them that can transmit a signal correctly to the engineer.

Q. I was just asking you if it was not customary that they work on the engineer's side?

A. It is customary when you have to be on that side, it is customary to be on the engineer's side.

Q. Of course, you knew that there were not half of the firemen that could transmit a signal correctly? You knew that?

A. I had not worked with all of them, Mr. Brown; no, sir.

Q. You knew at that time that there was not half of them that could correctly transmit a signal?

A. I didn't know it; that was my opinion.

Q. That was your opinion?

A. Yes, sir.

68 Q. And for that reason you would rather work on the engineer's side?

A. Yes, sir; I would.

Q. And so as a matter of fact, you wanted to work on the engineer's side?

A. It did not make any particular difference to me at this time whether I did or not.

Q. This was a careful fireman, was he? He could transmit a signal, could he,—this man?

Mr. Parkinson: We object to that question. That is not material to any issue here.

Q. It is cross examination, your Honor.

The Court: Objection overruled.

—. You say it made no difference on this occasion, you would just as soon work on the fireman's side, is that right?

A. Yes, sir.

Q. Isn't it a fact, Mr. Moore, that you jumped on the rear end of the tender, took hold of the lever and threw your knuckle open, and the engine going very slow, three or four miles an hour, if you did not jump off and undertook to pass over to the engineer's side so you would be on the engineer's side to signal?

A. That absolutely is not the truth, Mr. Brown.

Q. That is not the truth, is it?

A. No, sir.

Q. You have a distinct recollection at this time how you happened to stumble, do you not, how you caught?

A. I told the jury how I caught yes, sir.

Q. I did not ask you that. I asked you if you have a distinct recollection of how you caught?

A. Yes, sir; I have.

69 Q. You remember the circumstances of their taking you out from under the engine, do you, Mr. Moore?

A. No, I cannot say I do, Mr. Brown, because I was in a terrible condition.

Q. I appreciate that. You do not remember very much until you come to the hospital?

A. No, sir; not very much.

Q. But you do have a slight recollection of what occurred?

A. A slight recollection of a few things that occurred.

Q. After you came to the hospital, Dr. Wallace, the chief surgeon of the Grand Island Railway Company, and Dr. Hansen—he was your family physician, wasn't he?

A. Yes, sir; he was.

Q. And Dr. L. A. Todd, another assistant surgeon of the Grand Island, attended you, did they not?

A. Yes, sir; they did.

Q. Now, you know also that Dr. Hanson, in addition to being your family physician, was also one of the assistant surgeons of the Grand Island, don't you?

A. Let me see. I would not be positive of that, Mr. Brown, but I believe I do. I believe I remember of reading his name in the time card.

Q. He talked to you about it at the hospital, didn't he?

A. Well, now, I could not say whether he did or not.

Q. You don't remember that?

A. No, sir.

Q. But in your time card and in your literature that you had of the Grand Island Company, Dr. Hansen was listed as one of the surgeons?

A. That is what I told you, that I thought I seen it in the time card.

70 Q. And when Mr. Parkinson asked you this morning, what Dr. Hansen's bill was, you knew that Dr. Hansen attended you as a surgeon for the Grand Island Company, and did not have any bill?

A. Yes, sir; but there is another bill there yet, Mr. Brown.

Q. You knew at the time Mr. Parkinson asked you that question, that Dr. Hansen had no bill against you, and never intended to render any bill against you, didn't you?

A. I answered the question. I know that he did not; yes, sir.

Q. Then he had no bill against you, and what you got in the hospital came to you free, and without expense to you, didn't it?

A. Yes, sir. Wait a minute, not all of it; no, sir.

Q. What part did not?

A. Why, the first seven days I paid out $40 out of my own pocket for a special nurse, that the company would not allow.

Q. That they would not allow for a special nurse?

A. No, sir.

Q. Did they furnish a nurse?

A. Yes, sir; they had a nurse on the floor, but I was in such a critical condition, that the nurses on the ward and on the floor could not take care of me, and I had to go to the expense of a special nurse to sit by me, myself.

Q. Then you paid for an additional nurse, didn't you?

A. Yes, sir; I did.

Q. That was your aunt, wasn't it?

A. No, sir; it was not.

Q. Wasn't it your aunt? Didn't Mr. Hartigan pay your aunt to take care of you?

71 A. Mr. Hartigan paid my aunt, a lady that stayed up with me at nights after the first three weeks—I think after the first three weeks; why then they had my aunt to stay with me at night, and paid her.

Q. And Mr. Hartigan was with the Grand Island Company, and they paid for it?

A. I don't know whether he did or not, but the company paid for it.

Q. The company paid for it?

A. Yes, sir.

Q. And the amputation of your limbs and the taking care of you was done by skilled surgeons of the railway company, wasn't it?

A. Yes, sir; it was.

Q. And they did very faithful work on you, didn't they?

A. Yes, sir; they did.

Q. While you were in the hospital, did Mr. Hedrix, the superintendent of the company come to see you from time to time?

A. He came several times.

Q. He came to see you a number of times, didn't he?

A. A couple of times that I know of, Mr. Brown, yes, sir.

Q. And he talked with you about your future, didn't he; what you could do, what would be in store for you?

A. Yes, sir; he talked that way; yes, sir.

Q. And at no time did Mr. Hedrix ever ask you how you got hurt, did he? Did he ever at any time ask you how you got hurt?

A. I don't believe he did, Mr. Brown.

Q. And you did not at any time suggest to Mr. Hedrix, at any time you ever saw him, that the company wronged you

72 at any time, or under any circumstances, did you?

Q. I say now, Mr. Moore, there never was at any time that Mr. Hedrix ever came to see you, that you ever intimated or suggested that they backed an engine on you, when you had gone in behind it to do anything, did you?

A. Mr. Hedrix was present at the time Mr. Donan was there, he heard me make the statement in regards to insurance, he heard me tell Mr. Donan as the engine backed up, I tripped.

Q. Well, we will leave out that time. I will get to that in a minute. Outside of the time Mr. Donan, or whatever his name is, when he was there—you never at any other time said anything to Mr. Hedrix, or never complained to him that they had a defective coupling apparatus, or that they had a hose that hung down, or that they did not have grab-irons on the end of the engine, or that the engine was standing still, and you went in behind it, and they backed it over you, you never even suggested or intimated anything of that kind at any time?

A. Mr. Brown, I was in such a critical condition, always having morphine in me, I never discussed the case or how I got
73 hurt with anybody. I said as little as I could to people that come to see me, and did not cut them off short; I tried to tell as polite and nice as I could.

Q. I was asking you, Mr. Moore, if, at any time, Mr. Hedrix ever came there, you made any such suggestions to him?

A. I never made no suggestions in the case to Mr. Hedrix.

Q. And Mr. Hedrix continued to come to see you until you got well and able to leave the hospital?

A. Well, I don't know how often he did come, Mr. Brown, and when was the last time he came, I cannot say.

Q. Mr. Hedrix even took his wife up there to see you from time to time?

A. Yes, sir.

Q. I say that he took his wife up there to see you at the hospital to call on you?

A. Yes, sir.

Q. Did all he could to cheer you up, didn't he?

A. Yes, sir.

Q. And encourage you?

A. Yes, sir.

Q. Now, we will come to the time that Mr. Donan or Mr. Dorning or whatever his name was, was there. You carried some accident insurance in what company was it?

A. I believe it was in the Casualty Company.

Q. Was it the Continental Casualty Company?

A. I believe something like that. I believe that is what it was.

Q. And this Mr. Dorning or Mr. Donan, or whatever his name was, came here to St. Joseph, and went to the hospital to see you about settling with you, did he not?

A. Yes, sir.

74 Q. And Mr. Hedrix went to the hospital with him and introduced him to you, did he not?

A. Mr. Brown, he did not introduce Mr. Donan to me until my mother asked who this gentleman was with Mr. Hedrix.

Q. Did he introduce him then?

A. He introduced him then; yes, sir.

Q. I just asked you if he introduced him?

A. Yes, sir.

Q. Your mother was in the room, was she not?

A. Yes, sir.

Q. And Mr. Hedrix and Mr. Donan were in the room where you and your mother were at that time?

A. Yes, sir.

Q. After Mr. Hedrix introduced Mr. Donan, or whoever it may have been, he told you that he was the adjuster or the representative of the insurance company, didn't he?

A. Yes, sir; he told me.

Q. He told you that he had come there to make an adjustment with you, did he not?

A. Yes, sir.

Q. And in the course of the conversation, Mr. Donan or Mr. Dorning, or whatever it was, asked you how you happened to get injured, didn't he?

A. Yes, sir.

Q. And you told him, didn't you?

A. I told him in this way.

Q. Did you tell him how you happened to get injured, did you tell him?

A. I cannot answer the question without explaining it, Mr. Brown.

Q. Don't you know whether you told him how you happened to be injured or not?

A. I know what I told him; yes, sir.

75 Q. Go on and tell what you told him, what you told him?

A. He asked me how I got hurt.

Q. Then I just asked you——

A. And I told the gentleman, as the engine was backing up, the engine backed up, and I tripped, that is what I told the gentleman.

Q. You told him the engine was backing up, and as the engine backed up, you tripped?

A. No, sir; I did not.

Q. Would you read his answer, Mr. Stever?

Mr. Parkinson: We object to that, your honor, reading the answer.

Q. I just want to see what he said.

The Court: Objection overruled.

(Stenographer reads: "And I told the gentleman, as the engine was backing up, the engine backed up, and I tripped, that is what I told the gentleman.")

Q. Is that right now?

A. As the engine backed up, I tripped.

Q. That was what you told him, wasn't it?

A. That was what I told him; yes, sir.

Q. Now, Mr. Hedrix was there at that time, was he not?

A. Yes, sir, he was.

Q. Even then Mr. Hedrix did not ask you a thing, did he, about it?

A. No, sir.

Q. He just merely sat there and heard the conversation that passed between you and Mr. Donan?

A. Yes, sir.

76 Q. Now, you did not tell Mr. Donan at that time when he asked you how it occurred, you did not tell him that you had gone in behind to open a defective knuckle, and while standing there, they backed the engine over you?

A. No, sir.

Q. Although he asked you how it occurred, didn't he?

A. He asked me how I got hurt; yes sir.

Q. And you told him as the engine was backing up, that you tripped and fell?

A. No, not as the engine was backing up, as the engine backed up.

Q. As the engine backed up?

A. That is it.

Q. You tripped and fell?

A. Yes, sir.

Q. That is what you told him is it?

A. Yes, sir.

Q. Now, you did not say anything about catching on a steam hose, did you?

A. I never told Mr. Donan any more than just what I have said.

Q. And you did not say anything about there being no grab-irons on the tender?

A. I never discussed the case with him; no, sir.

Q. Although he was there for the insurance company endeavoring to ascertain the circumstances connected with how you were injured, wasn't he?

A. He come there to settle with me; yes, sir.

Q. He come there to settle with you?

A. Yes, sir.

Q. I want to ask you this question, if you did not tell Mr. Donan in the presence of your mother here, and in the presence of Mr. Hedrix, that you had signalled the engine to back up, that as the engine was backing up, you grabbed the corner of the tender
77 as it passed you, and that was the last you remember?

A. Mr. Brown, that is absolutely not the truth. I never told him any such thing.

Q. I just asked you if you told him that is all. Now, you did not tell him that, did you?

A. No, sir.

Q. Prior to the time that Mr. Donan or Mr. Dorning, or whoever he was, came to see you, had you made any affidavit of your claim as to the loss of your limbs to present to the insurance company?

A. Why, there was two gentlemen came there to see me, with some kind of papers, and they went ahead and filled them out for me.

Q. I understand.

A. So as I could get my insurance money.

Q. Who were they that came there?

A. I think one of the gentlemen was Mr. Purvis and the other one was Mr. Tansell.

Q. Mr. Purvis is the secretary of the Grand Island Railway Company, is he not?

A. I could not say, Mr. Brown.

Q. He is an officer down there in the office of the general manager?

A. He works in the office down there.

Q. And a Notary Public, is he not?

A. Yes, sir; he is, I said he was.

Q. Well, you have to make affidavits of your claims before a notary public, didn't you?

A. Yes, sir.

Q. And Mr. Purvis from the Grand Island office—and who was the other man that came with him?

A. Mr. Tansell, I think.

78 Q. He also was an employe in the office down there, was he not?

A. Yes, sir; he was employed in the Claim Agent's Office; yes, sir.

Q. And they came up to you at the hospital, and you made an affidavit to be presented to the insurance company, didn't you?

A. Yes, sir.

Q. In order that you might get your insurance?

A. Yes, sir.

Q. Now, I will ask you first, when these gentlemen were there, were you asked questions as to when your injury occurred, that is as to the date, and what occupation you were in and how it occurred and so forth?

A. I believe I was asked some questions, Mr. Brown, of when I was hurt.

Q. And how you were hurt?

A. I don't think I answered the question as to how I was hurt, only as I answered another just before that.

Q. Well, in any event, they gave you—it was a blank, a blank of the insurance company that was to be filled out, was it not?

A. It must have been; yes sir; I could not say whether it was a blank or not.

Q. Well, I mean it was an application or affidavit of claim, that you had to present before getting your money, was it not?

A. I don't know what it was, Mr. Brown, because they just brought it there and said it had to be filled out, and did not tell me what it was, only said it would have to be filled out to get my money, and I did not read it.

Q. Did you answer the questions?

A. They answered part of them, and I answered part of them.

Q. Is it not a fact that they asked you every question, read the printed questions to you, and explained them to you, fully

79 at that time, and if they did not ask you the questions and tell you—here it is here—and ask you what your answer was to it?

A. Some of the questions they did, Mr. Brown, and some little minor questions, I remember now, they would say, oh, well, we can answer that, and I sat or I lay there and said it was all right. I did not sit, I lay there.

Q. After they filled it out, did they read it over to you, and show it to you?

A. I could not say whether they did or not, Mr. Brown.

Q. They took this and held it before you and showed it to you and read it all over to you, didn't they?

A. I could not say they did, Mr. Brown.

Q. They had to sign your name to it, and asked you to touch the pen with your stub, where the cross mark is made?
A. I believe they did; yes, sir.
Q. And then swore you to the statement, didn't he?
A. Yes, sir; I believe he did.
Q. Now, I will show you the paper marked Affidavit of Claimant, as to limbs, and what does it say, Mr. Moore?
A. Lay it down there.
Q. I wish you would tell the jury if that is the paper that they brought there for you to fill out, or have filled out—is that the paper that they had there?
A. Yes, sir; that is the paper that they had there. Yes, sir.
Q. Now, in reply to the following questions: "What were you doing at the time the injury was received, and how did it happen," you made the following answer, did you not: "Taking engine into siding to couple onto car, doing local switching, fell in front of tender, and was run over by tender of engine; engine was
80 backing up." Was that the statement you made to them?
A. No, sir; Mr. Brown, that was not the statement.
Q. What statement did you make to them?
A. I told Mr. Tansell or Mr. Purvis, the same as I told Mr. Donan.
Q. All right, did you tell them you were backing the engine into siding to couple on to some cars, did you tell them that?
A. I might have, but I don't recollect of telling them that.
Q. Whether you told them that or not, you were doing that?
A. I was going to do that; yes, sir.
Q. "Doing local switching?" Were you doing that?
A. We were doing local switching; yes, sir.
Q. That is right, too?
A. We were in the local yards.
Q. Did you tell them that?
A. I could not say I did, Mr. Brown.
Q. "Fell in front of engine and was run over," did you tell them that?
A. No, sir; I did not tell them that.
Q. You did fall in front of it and was run over?
A. I was; yes, sir.
Q. That was true whether you told them that or not?
A. It was true; yes, sir.
Q. By the tender of the engine?
A. Yes, sir; by the tender.
Q. That was true whether you told them that or not, that was true?
A. That was true; yes, sir.
81 Q. And the engine was backing up, did you tell them that?
A. That was untrue.
Q. The engine was not backing up; was it, or not?
A. Not when I went in behind it; no, sir.
Q. I said when you were run over?
A. When I was run over; yes, sir.

Q. The engine was backing up?

A. Yes, sir.

Q. So whether you told them or not; it was all true, wasn't it? Every word of it was true, whether you told them that or not?

A. What is in that paper?

Q. The questions I asked you.

A. The engine was backing up, when I got run over; yes, sir.

Q. Now, when they asked you these questions, when they were there filling out this blank, you did not tell them, that the steam hose caught you, did you?

A. I never told anybody about that I don't believe, Mr. Brown.

Q. Never told any living soul that you was caught by the steam hose until you told your lawyers, did you?

A. I never discussed the case with anybody, Mr. Brown.

Q. I am asking you if you ever told a living soul in the world that you were caught by the steam hose until you told it to your lawyers?

A. I could not say whether I did or not.

Q. Did you ever know anything about it prior to that time?

A. Anything about what?

Q. Being caught by the steam hose?

A. I knew it; yes, sir.

82 Q. But you never mentioned it to anybody, did you?

A. Not that I recollect; no, sir.

Q. Not that you recollect?

A. No, sir.

Q. Now, did you ever mention to a living soul in the world that the coupler was out of fix, did you, until you told your lawyers?

A. Yes, sir.

Q. Who?

A. I told Mr. Pigg, the conductor, a day or so before that.

Q. We will get to that in a minute. Except the time you told him before the accident?

A. You mean anybody else before?

Q. Yes. After the accident had occurred? You never told a living soul in the world about the defective coupler except your lawyers, did you?

A. Not that I remember of; no, sir.

Q. Not that you remember. And you never told anybody about there being no grab-irons on the rear end of the engine, did you?

A. Not that I remember of; no, sir.

Q. Not the physicians, or the attendants or any of your friends, or anybody else, you never even told them, did you?

A. No, sir; not that I remember of.

Q. But you told your lawyers when you saw them?

A. Yes, sir.

Q. When did you first see your lawyers?

A. I could not say exactly when it was, Mr. Brown.

Q. About when was it, do you know?

A. Some time after I was out of the hospital I guess, and maybe more. I don't know exactly.

Q. Do you know about how long it was after you were out
83 of the hospital?

A. Yes, sir; it was after I was out of the hospital, Mr. Brown, after I come home.

Q. That was nearly two months after the accident occurred, before you ever saw your lawyers, wasn't it?

A. Yes, sir; it was that month; yes, sir.

Q. More than that, wasn't it?

A. Yes, sir.

Q. And during all of that period of time, you never even suggested, notwithstanding the fact that the railway people had been to see you, and had talked with you, you never made a complaint to a living soul that you had a defective coupler, or that they had a hose hanging down that should not have been there, and that you tripped on it, or that they did not have grab-irons on the tender, did you?

A. Not that I remember of, Mr. Brown.

Q. And you never mentioned to them that they had backed an engine over you, when you were in behind it, when it was standing still?

A. Not that I remember of.

Q. Do you know young Mr. Hartigan, who was an assistant superintendent of the Grand Island?

A. The one that was the claim agent?

Q. He was in the claim department and was an assistant superintendent?

A. I guess I know the one you mean.

Q. Did Mr. Hartigan call to see you at the hospital?

A. He did a couple of times; yes, sir.

Q. Did Mr. Hartigan talk with you about the accident?

A. I don't believe Mr. Hartigan did.

Q. Mr. Hartigan asked you how it occurred, didn't he; just think it over now, and see whether or not Mr. Hartigan did not ask
84 you how the accident occurred?

A. I don't think Mr. Hartigan did, because I was in such a critical condition all the time he was there, that I was not able to do much talking at any time.

Q. You were not in a critical condition two or three weeks after the accident, were you?

A. Yes, sir; I was.

Q. Of course, I mean you were seriously injured. I don't mean to reflect upon that at all. I mean that you were mentally perfectly all right, and were talking with your friends, or anyone who came to see you?

A. I talked to them a little, yes, sir, Mr. Brown, but I was still taking morphine.

Q. Now, I want to ask you now, whether or not Mr. Hartigan was in there, after the time Mr. Donan was in there, and the superintendent, Mr. Hedrix, was in there and whether or not Mr. Hartigan asked you how the accident occurred, how did you happen to get hurt, and don't you remember that you told Mr. Hartigan there in

the hospital, that you had signalled the engine to back up—just wait, please—that you had thrown the switch and signalled the engine to back up and as it came by you that you got on——

Mr. Parkinson: He didn't say that, Mr. Brown. He says he don't know anything about how it happened.

Q. I don't believe he does. Just a minute, I will ask it. Now, Mr. Moore, after you had been operated upon and after you were convalescing and able to sit up, did Mr. Hartigan visit you at the hospital?

A. Not that I remember of, Mr. Brown; no, sir.

85 Q. Now, I will ask you if on that occasion, or on any occasion, he asked you how you happened to get caught in that way, and if you said to him, that the engine had passed down over the switch, that you had thrown the switch, and signalled them to back up, that you started across the track around behind the engine as it was backing up and in some way you stumbled and fell, and you did not know exactly how you tripped and stumbled, but that you went down, and did you further state, that you did not think they would ever catch you?

A. Mr. Brown, I never made no such statement as that to Mr. Hartigan at all.

Q. You did not make a statement of that kind, that is those words or words to that effect to Mr. Hartigan, did you?

A. No, sir; I did not, Mr. Brown.

Q. In the hospital?

A. No, sir.

Q. And you never told Mr. Hartigan that they had backed an engine over you, when you went in there to fix the coupler, did you?

A. No, sir; I did not.

Q. This conversation that you had with Mr. Pigg about a defective coupling, when was that?

A. That was a day or so before I got hurt.

Q. Well, was it now a day or so, a day or so before you got hurt?

A. Well, a day or two.

Q. What is your best recollection, was it the day before or two days before?

A. Mr. Brown, I cannot state the exact day it was.

Q. Where did the conversation occur?

A. It was somewhere out of Hiawatha, going west.

Q. It was somewhere west of Hiawatha?

A. Yes, sir.

86 Q. Was the train running or standing still?

A. We were switching in some yards, I believe.

Q. What yards were you switching in when this conversation occurred with Mr. Pigg?

A. Well, I don't know exactly, Mr. Brown.

Q. Under what circumstances? Where were you standing, or who was present when you made this complaint to Mr. Pigg?

A. Nobody but Mr. Pigg and I.

Q. There was not any other switchman there or brakeman?
A. Not right with us; no, sir.
Q. Nobody where they could hear the conversation, was there, that occurred?
A. No, sir; I think not.
Q. That occurred between you?
A. No, sir.
Q. Were you in the car or on the engine or walking on the ground?
A. I believe we were standing on the ground.
Q. On the platform somewhere, do you mean?
A. I don't think we were on any platform; no, sir.
Q. You don't even know whether you were standing or walking or riding when this occurred?
A. No, we were on the ground. We were switching.
Q. Were you walking along switching or standing, or what were you doing?
A. We were standing at the time I told him.
Q. What town was it in?
A. I told you I did not know exactly, what town it was in.
Q. What time of day did it occur?
A. Some time in the morning I told him.
87 Q. Some time in the morning?
A. Yes, sir.
Q. But you don't know what day it was that you told him that?
A. I think I said, I did not know, but I believe it was on a Monday morning.
Q. You think it was on a Monday morning?
A. Yes, sir.
Q. Just as you started out?
A. Why, after we started out of town.
Q. Out of what town?
A. Out of Hiawatha, up the road some place.
Q. Going west up the road some place?
A. Yes, sir.
Q. Where did you first notice the coupler was defective? Where was it when you first observed that?
A. It was in Hiawatha when I first noticed it.
Q. You first noticed it in Hiawatha?
A. The morning we got the engine.
Q. The morning you got the engine?
A. Yes, sir.
Q. Did you say anything about it there?
A. I did not say anything to him there. We went ahead and made up the train, and I told him afterwards.
Q. You did not say anything to him there at all?
A. No, sir.
Q. You could not open it at that time at the side of it at all?
A. I could not open it from the outside; no, sir.
88 Q. It would not work from the outside?
A. No, sir.

Q. But this defect was such a defect that could not be remedied except at the shops?
A. It could be fixed at the other end of the line.
Q. It could be fixed at the shop at the other end of the line?
A. Yes, sir.
Q. It was a defect that could not be fixed on the road?
A. No, sir; it could not.
Q. So the engine, if it was in perfect condition when it got into St. Joseph on that trip, don't you think that it was probably in perfect condition when you got hurt?

Mr. Mytton: We object to that, your honor. That calls for his conclusion. We object to that question, your honor, and ask that it be read.
Mr. Parkinson: That is asking for a conclusion.
The Court: Objection sustained.
To which action and ruling of the court the defendant then and there duly excepted and still excepts.

Q. Was there anybody else present when you discovered this defect in the coupler?
A. No, sir.
Q. In the coupling apparatus?
A. Not with me; no, sir.
Q. You did not say anything to the engineer or fireman right close there by you?
A. No, sir; I did not.
89 Q. There were two other switchmen on the train, was there not?
A. Two brakeman; yes, sir.
Q. Two brakemen, I mean?
A. Yes, sir.
Q. Did you say anything to them to look out for that coupling apparatus on the rear end of the tender?
A. I did not; no, sir.
Q. You did not mention it to them?
A. No, sir.
Q. You knew they might have to do coupling, did you not?
A. Not with the engine; no, sir.
Q. Well, you knew they might on some trip, did you not, they might have to work with it?
A. Not my partner brakeman, would not; no, sir.
Q. Not your partner brakeman?
A. No, sir.
Q. You don't know whether they had worked with it, do you?
A. I know that they had not worked with it that morning.
Q. Notwithstanding it was defective this way, you did not mention it to any of the rest of the train crew, did you?
A. Not right at the time I noticed no, sir.
Q. But you afterwards, you say, you mentioned it to Mr. Pigg?
A. Yes, sir; I did.
Q. Now, refreshing your memory, after going over it a little

while, and getting your memory refreshed, don't you think this conversation with Mr. Pigg occurred the first morning that you got the engine, in place of a day or two days before the accident, don't you think it occurred the very first morning you got the engine, and occurred just a little while after you got it, and a little while after you got out of Hiawatha, that you then told him about it?

90 A. I could not say, Mr. Brown. I told you that it did not occur at Hiawatha.

Q. But don't you think it occurred just a little piece out of Hiawatha?

A. I could not say whether it did a little piece or not. It occurred up the road some place.

Q. It occurred up the road some place?

A. Yes, sir.

Q. And that is as near as you can tell the jury about it?

A. I told you at some station when we were doing switching.

Q. You knew that the rules of the company prohibited your going in behind the engine at all?

A. The rules don't prohibit you going in behind an engine to open a knuckle; I never saw any rule to that effect if it does.

Q. I will ask you if you knew that this rule was in effect at that time: "Employes must not remove any of the appliances of an engine or cars for convenience in switching, endangering the safety of themselves or others; coupling apparatus must be examined and if out of order they must not attempt to make coupling"? Did you know that?

A. No, sir; I did not.

Q. (Reading.) "They are warned not to get on front or rear of an engine or the end of a car as it approaches them, or to go between cars in motion to uncouple, open, close or arrange knuckles or couplers or follow other dangerous practices." You did not know anything about that, did you?

A. I knew you were not supposed to hop on an engine.

Mr. Mytton: What page are you reading from?

91 Q. I am reading from section 413 at the top of page 102, of the Rules of The Grand Island Railway Company. You did not know then that the company absolutely prohibited you and that the "Coupling apparatus must be examined, and if out of order, they must not attempt to make coupling," you did not know that, did you?

A. No, sir; I did not know that.

Q. Did not know that you were prohibited from doing that?

A. No, sir.

Q. And you did not know that you were "warned not to get on front or rear of an engine or the end of a car as it approaches them, or to go between cars in motion to uncouple, open, close or arrange knuckles or couplers or to follow other dangerous practices"—you did not know that, did you?

A. I knew that you must not go in between cars when they were

in motion. I knew that you must not get on the front end of engines.

Q. But you did not know that if the coupling apparatus was out of order that you must not attempt to make a coupling?

A. I did not know that; no, sir.

Q. You did not know that, did you?

A. No, sir.

Q. The photograph that I showed you a little while ago of engine 45 shows the knuckle closed, does it not?

A. It does; yes, sir.

Q. That shows the knuckle closed?

A. Yes, sir.

Q. And the rod that extends across there with the handles turning down at the ends, that is the lever that is supposed to operate the coupling device automatically, is it not?

92 A. Yes, sir; it is. May I show that picture to the jury, Mr. Brown?

Q. No, it is not in evidence yet, and it will be shown to the jury a little later. That is what I am getting ready now for, to show it to the jury. Now, if you will look at defendant's Exhibit Number 5, that is a picture of the same engine, is it not?

A. It looks like a picture of the same engine.

Q. And that shows the knuckle open, does it not?

A. Yes, sir; it does.

Q. The only difference between the two photographs, or the only material difference is merely that one shows the knuckle closed and one shows it open, that is true is it not? I mean anything substantial. I don't mean to catch you on that?

A. Just about the same, Mr. Brown.

Q. Would you look at home tonight when you go home and bring to the court house tomorrow the book of rules that you have?

A. You will have to ask my lawyers about it. They can tell you.

Mr. Parkinson: Have you got it?

A. I think I have it at home.

Mr. Parkinson: Bring it then.

A. Yes, sir; all right, Mr. Brown.

Q. Will you bring it to the court room tomorrow?

A. Yes, sir.

92½ SAMUEL A. BAUGHMAN, called as a witness on the part of the plaintiff, first being duly sworn, testified as follows:

Direct examination by Mr. Parkinson:

Q. What is your full name?

A. Samuel A. Baughman.

Q. Where is your home?

A. Block 55, Palmyra Addition to Marysville, Kansas.

Q. How long have you lived in Marysville?

A. Just lacks a few days of being nine years.

93 Q. Were you at Marysville on the 9th day of June, 1910, when the young man was injured?

A. Yes, sir.
Q. Will you tell the jury, please, how long after it happened you arrived at the scene?
A. I do not think it was over five minutes.
Q. Were they taking him out when you got there?
A. They had just taken him out.
Q. They had just taken him out?
A. Yes, sir.
Q. And where had the engine moved to?
A. Possibly 100 or 150 feet south of where he was taken out.
Q. Towards the depot?
A. Yes, sir; towards the depot.
Q. While you were standing there, did they take him away while you were there?
A. Yes, sir.
Q. Do you know where they took him to?
A. To Mr. Roseberry's.
Q. To Mr. Roseberry's?
A. Yes, sir.
Q. Where was that?
A. About a half block south and about two and one-half blocks west of where he was hurt.
Q. After they took him over there, did you remain at the place where he was injured?
A. A few minutes.
Q. While you were there, did anyone call attention to a part of Mr. Moore's body?
A. One man did, I think he was a brakeman, but I would not state positively.
Q. And what did he say?

94 Mr. Brown: I object to what he said.
The Court: Objection sustained.

Q. Did he call your attention to any part of Mr. Moore's body?
A. Yes, sir.
Q. What part of his body was that?
A. A part of his left hand.
Q. Where was the left hand?
A. Gripping over the west switch rail.
Q. The west switch rail of what track, Mr. Baughman?
A. The track branching from the main track to the east.
Q. You mean the cross-over track here? (indicating.)
A. Yes, sir.
Q. Did you pick that hand up?
A. About twelve feet from the point of the switch rail.
Q. Who picked the hand off of the rail?
A. I did.
Q. And this is the rail that it was on, right here? (indicating.)
A. Yes, sir; the west rail.
Q. The west rail of the cross-over switch?
A. Yes, sir.

Q. Did you measure that distance?
A. Yes, sir.
Q. Now, show the jury how it was gripping that rail, Mr. Baughman?
A. It was gripped over the rail, in that manner (indicating).
Q. And what part of the hand was in the glove?
A. The four fingers and part of the hand, and possibly that far down on the hand (indicating).
Q. When you picked this hand up, it was still fastened to
95 the side of the rail?
A. The glove was sticking to the rail and some of the flesh.
Q. And that was twelve feet north of this switch point?
A. Yes, sir.
Q. What did you do with that hand when you picked it up?
A. I stood there and held it and waited a few minutes, and then took it down to Mr. Roseberry's.
Q. Who did you deliver it to?
A. To Roy Pigg, the conductor.
Q. What did he do with that hand?
A. Took the fingers out of the glove, took the rings off of his fingers, put them in his pocket, and put the hand in the canvas that was under Mr. Moore.
Q. Those rings were turned over to Mr. Moore, or do you know about that?
A. Mr. Pigg put them in his pocket at the time.
Q. You don't know when they were turned over to Mr. Moore?
A. No, sir; I do not.
Q. Mr. Baughman, did anyone come to see you later in the day about this matter?
A. Yes, sir.
Q. Who?
A. Mr. Lonergan and Mr. Hartigan.
Q. Who is he?
A. Mr. Lonergan is the agent at Maryville.
Q. Who is the other man?
A. I think at that time he was the claim agent for the railway company.
Q. Did you show them the point where this was found?
A. Yes, sir; I did.
96 Q. When was that, that you showed them?
A. Sir?
Q. When was it that you showed them?
A. Possibly three or half past three in the afternoon.
Q. What time was it that Mr. Moore was hurt?
A. About 9:30.
Q. About 9:30?
A. Yes, sir.
Q. And when you showed Mr. Hartigan the place where the hand was found, what, if anything, took place?

A. Well, there was some difference in opinion of the distance it was found from the switch point.

Q. Are you positive where you found it?

A. Yes, sir. After we had the difficulty over it, I went back afterwards and measured the distance, so to see that I was in the right.

Q. Did Mr. Hartigan afterwards gather any men from in the city while you were still there?

A. Yes, sir.

Q. Did he tell them anything about what you had said?

Mr. Brown: I object to it unless it was in his presence.

Mr. Parkinson: That is all, take the witness.

Cross-examination by Mr. Brown:

Q. Mr. Baughman, you say you were there about how long after the accident occurred?

A. Possibly five minutes.

Q. You did not see it occur?

A. No, sir; the engine was between us.

97 Q. Well, the engine was between you?

A. Yes, sir.

Q. Were you south of the——

A. (Interrupting.) I was south of the engine going north on the west side of the main track, going towards my home.

Q. Did you see this man before he was hurt at all?

A. No, sir. Well, I may have seen them, but would not recognize them. There were several standing around the train, and they were switching.

Q. When you got down there, you say you found a part of his left hand?

A. Yes, sir; after he was taken away.

Q. After he was taken away?

A. Yes, sir.

Q. And you say it was just about here down? (indicating.)

A. The fingers and a little of the hand.

Q. The fingers and a little of the hand?

A. Yes, sir.

Q. That was in a glove?

A. Yes, sir.

Q. And that was laying over the west rail of the cross-over track?

A. Yes, sir.

Q. Of course, it was not gripping the rail?

A. Like his hand had gripped the rail.

Q. It was not gripping at that time?

A. Not at that time.

Q. The hand was simply laying on the rail, and had been mashed off there in the glove?

A. Yes, sir.

Q. You did not find any other hand, did you?

A. I did not.

98 Q. Only one hand there?

A. Only one.

Q. Now, you are the man that took that hand and took it away, aren't you?

A. Yes, sir.

Q. You were not there when the other man picked it up and put it on the board and carried it away?

A. I was there and helped put Mr. Moore on the board.

Q. Did they put the hand on the board at the time you were there, and carry it away?

A. No, sir; it was afterwards.

Q. You did not see them do it, did you? I say you did not see anyone else pick the hand and take it away themselves?

A. No, sir.

Q. And you were the man that did that?

A. Yes, sir, I am.

Q. And you think it was about twelve feet from the switch west?

A. From the switch north.

Q. I mean from the switch north?

A. Yes, sir.

Q. I had west in mind there, I mean north. How long after that was it until Mr. Hartigan of the Grand Island Company was down there to the scene of the accident?

A. This happened about 9:30 as near as I can remember, and it was somewheres along 3:00 or 3:30 when Mr. Hartigan was there.

Q. When he came down there?

A. Yes, sir.

Q. Who did Mr. Hartigan have with him?

A. Mr. Lonergan.

Q. The station agent, you mean?

A. Yes, sir.

99 Q. Was there someone else there with him afterwards down to the scene of the accident?

A. Yes, sir; afterwards, I think there was.

Q. Were you down there with them at that time?

A. I was there, down there, when there were several measuring.

Q. Were you there when the citizens of Marysville made that measurement and found the spot of blood, where they said evidently he had first gone on the track, and talked about it in your presence?

A. There was considerable talk, but I did not pay any attention to what was said.

Q. The whole thing was talked about in your presence there?

A. Principally so.

Q. And they were trying to locate the place where the man had been run over, weren't they?

A. Yes, sir.

Q. And when they found the place and made the measurements,

you did not even suggest anything to the contrary, now that you had ever found anything, and never said anything?

A. I did not pay any attention to the measurements they took.

Q. Why were you there? What were you doing there?

A. Mr. Lonergan and Mr. Hartigan took me there.

Q. You were with the other men there?

A. And then they got the other men, and Mr. Lonergan never said that he was through with me, and I just stayed there.

Q. You stayed there all that length of time?

A. No, sir.

Q. From 9:30 to 3:00?

A. No, sir; before three in the afternoon they came to my home and got me.

100 Q. And took you with the other men?

A. No, sir; took me there first, and got the other men later.

Q. Who were these men from Marysville?

A. R. C. Guthrie.

Q. What is his business?

A. He is in the undertaking and furniture business. E. O. Weber, lumber dealer.

Q. And who else?

A. Edward Thompson. He is in the poultry business, and Mr. Eddington, R. C. Eddington, the photographer.

Q. Now, did you see them find the spot of blood, that is the spatter of blood?

A. Well, there was several splashes of blood.

Q. I mean the first splash of blood that appeared on the tracks——

A. I don't know whether I did or not.

Q. You were present there with them, were you not?

A. As I said before, I did not pay much attention to that part of it.

Q. You did not at any time to Mr. Hartigan or any member of the number of citizens who had gathered there, you did not make any suggestions that you had ever found any hand, or that the accident occurred at any other place, or that you found any other place except the place they agreed upon as being the place?

A. The twelve feet from the switch point?

Q. I mean the point where they found the blood, and made the measurements?

A. Mr. Hartigan thought it was further back than I thought it was.

101 Q. When those men were there, you made no suggestion of any kind or character?

A. No, sir.

Thereupon the plaintiff rested his case.

The defendant, to sustain the issues on its part, offered and introduced the following testimony:

Mr. Brown: Your Honor, I will read a deposition at the present time. If the court will let me I will just sit down—it is quite long. I will read you the deposition of Mr. Roy Pigg, the conductor.

Said deposition taken on the 2nd day of December, 1911, was then read to the court and jury and is as follows:

ROY PIGG, of lawful age, being sworn in the manner required by law, upon his oath states:

Examined by Mr. John G. Parkinson, attorney for plaintiff:

Q. State your full name.
A. Roy Pigg.
Q. How old are you?
A. 31 years old.
Q. Where do you live at the present time?
A. Portland, Oregon.
Q. I believe you are employed by the Oregon Short Line?
A. Oregon Electric.
Q. Street Car Company?
A. No, sir; interurban, same as railroad.
Q. What is the correct name of that railway?
A. Oregon Electric Railway Company.
102 Q. About what time was he hurt?
A. Near as I could tell it was about 9:15—I did not look at my watch right away, and it is pretty hard to tell to the minute.
Q. Where had you been during that 15 minutes?
A. Had been to the depot.
Q. The track there runs north and south, I believe?
A. Yes, sir; more north and south than east and west—call it east and west because it is that way all the way.
Q. In speaking of north you are talking of the west terminus of the road?
A. Yes, sir.
103 Q. In speaking of the south you are talking of the east terminus?
A. Yes, sir; of course we say east and west, because it is that way all the way.
Q. He was injured about how far north of the depot?
A. I think it is two blocks.
Q. You say you had been to the depot during the entire time?
A. I went to the depot when I first came to town and I gave in my bills and was in the depot maybe five minutes—maybe a little longer, and then I came back to where the boys were switching.
Q. Had he been injured at that time?
A. No, sir.
Q. Were you walking up there?
A. Yes, sir.
Q. Walking toward the place where he was injured?

A. Walking toward where they were working.
Q. From the depot?
A. Yes, sir.
Q. Had you reached the engine?
A. Yes, sir; and gotten on the pilot of the engine.
Q. When he was injured?
A. No, sir; I was on the ground.
Q. When did you get on the pilot of the engine?
A. When I came up from the depot.
Q. Where was the engine at that time?
A. East of the cross-over switch.
Q. When he was injured?
A. When first went up was not backing up, down on the main line.
Q. Do you mean towards the depot?
A. Yes, sir.
104 Q. And you got on the pilot of the engine and rode where to?
A. Up past the switch and pulled the pin and then got off.
Q. Where had the engine gone to?
A. Down the main line.
Q. For what purpose?
A. Drop the three cars by us—three cars ahead of the engine.
Q. You mean that there were two or three cars ahead of the engine?
A. Yes, sir.
Q. And to the south?
A. Yes, sir.
Q. The engine was headed south?
A. Yes, sir.
Q. And you pulled the pin and let the cars drop?
A. The engine went down the main line and the cars down the cross.
Q. And they were these three cars?
A. Yes, sir; which went down in the yard about 10 car lengths, possibly more.
Q. And these were the same three cars that the engine was backing in to pick up at the time he was injured?
A. Yes, sir—they had another car to get down—they were the first three cars out that they would couple into after — went back there—they had a little more work to do.
Q. Where did you get off of the engine?
A. I should judge maybe 40 or 50 feet from the switch stand.
Q. Which direction from the switch stand?
A. North.
Q. On which side of the engine did you get off?
A. South side, west side going north—we call it south side.
105 Q. Off the east or west?
A. West side.
Q. Where did the engine go after you got off?
A. Back the main line over the switch.

Q. Did you stand where you were?

A. Did until the engine went by me and then I walked across the track on the east side.

Q. Before the engine went back you were on the west side?

A. Yes, sir; I got off the pilot and stood there until the engine passed me and then I walked over on the east side.

Q. About fifty feet north of the switch-stand?

A. Yes, sir; but walked back possible 10 or 12 or 20 feet.

Q. Not over that?

A. Not over that, I guess.

Q. When you got off the engine you were about fifty feet north of the switch stand?

A. I judge so.

Q. And you think you walked back 10 feet?

A. Yes, sir; maybe more, maybe 25 feet,—I would not say how far because I did not measure the distance and I don't know the distance.

Q. Which direction were you looking as you walked that way?

A. Looking at Mr. Miller, the section boss, foreman.

Q. Where was he?

A. East side of the track.

Q. Whereabouts?

A. Near as I can remember nearly opposite the main line frog.

Q. You mean the frog north of the switch stand?

A. Yes, sir.

Q. What do you mean by frog?

106 A. Frog is a railroad frog. You have to have a frog on the main line when another track comes off of it,—can't explain what it is, but a frog is two flanges.

Q. Where one rail of the main line crosses one rail of the switch track?

A. Yes, sir.

Q. So it would be in about the center of the main line track?

A. No, frog would be the right hand rail.

Q. Looking which way?

A. Looking across over.

Q. It would — the left hand rail of the side track and the right hand rail of the main line, as you looked north?

A. Yes, sir.

Q. How far would that frog be north of the switch stand?

A. I don't know the distance between the frog and the switch stand.

Q. Your best judgment, please?

A. I should judge 38 feet.

Q. You think he was about 38 feet north of the switch stand?

A. I should judge about that distance.

Q. And how far east of the main track was he?

A. Five or six feet.

Q. And how close were you to him when you stopped walking?

A. Right up at the side of him.

Q. Which way was he facing?

A. South.
Q. Which way were you facing?
A. Facing south.
Q. Were you standing east or west of him?
A. West side of him.
107 Q. You were standing then directly west of him and between him and the track?
A. Yes, sir.
Q. And right next to him?
A. Yes, sir.
Q. Were you talking to him?
A. Just started to talk to him.
Q. What did you say to him?
A. How-do-you-do, Mr. Miller.
Q. What did he say?
A. Hello, Pigg.
Q. What did you say then?
A. I don't remember saying anything more to him at that time.
Q. Where was the engine while you were walking south across the track?
A. The engine had gone over the cross-over switch on the main line.
Q. How far south of the switch did the engine go?
A. Could not say exactly.
Q. Where was Ralph Moore when you got off the engine?
A. At the switch.
Q. You saw him there?
A. Yes, sir; he threw the switch over and the engine went by.
Q. What did he next do?
A. Stood at the switch until I sent the engine back to him.
Q. Until you sent the engine back?
A. Yes, sir.
Q. Who did you give the signal to?
A. Engineer, after I got off the pilot.
Q. You were still on the west side?
A. Yes, sir.
Q. You lost sight of him as the engine ran between you and him?
A. Yes, sir.
108 Q. And then you walked south and across the track?
A. Yes, sir.
Q. When did you catch sight of him again?
A. Saw him throw the switch.
Q. When he threw the switch to let the engine go back on the cross-over track?
A. Yes, sir.
Q. Did you give any signal to anyone to move that engine back?
A. I did not.
Q. Were you looking at him when he threw the switch?
A. Yes, sir.
Q. What did he do?
A. Gave the signal to back up.

Q. While at the switch?
A. Yes, sir.
Q. Where was the engine?
A. South of the switch.
Q. About how far south of the switch?
A. Can't say.
Q. About how far?
A. Maybe three feet, might have been eight or ten.
Q. How far was the engine away from him?
A. Well, he stepped on the north side of the switch stand,—he stepped around and came back up the side and I could not say how far the switch stand was from him or how far the engine was from him,—he might have been two feet from the switch stand and ten feet from the engine, but I could not say exactly.
Q. What did he next do?
A. Got on the fireman's side on the tank.
Q. Where?
A. On the back end of the tank.
Q. How far did the engine move back before he did that?
A. Possibly ten or twelve feet.
Q. How far did he ride on there?
A. Short distance.
Q. How fast was the engine going?
A. Four or five miles an hour.
Q. That is a little faster than a man can walk?
A. Little faster, yes.
Q. Then what did he do?
A. Got off.
Q. Where did he get off?
A. Got off on the side.
Q. Then what did he do?
A. Went across the front of the tank.
Q. Was the engine moving?
A. Yes, sir.
Q. About four or five miles an hour?
A. Yes, sir.
Q. What had he done while on the back of the tank?
A. Gave the lever a jerk.
Q. What do you mean by the lever?
A. Lever to raise the pin to open the knuckle on the engine.
Q. Was he on the side of the tender when he did that?
A. Did that as soon as he got on.
Q. Did the knuckle open?
A. I could not say.
Q. What did he do then?
A. Got off and started to the other side of the track.
Q. How many steps did he take?
A. Could not state, maybe two and maybe three.
Q. Got inside the track between the rails?
A. Yes, sir; one foot over the rail and one on the east side rail.

Q. Then he was not between the main line rails?
A. Yes, sir.
Q. And then what happened?
A. Stumbled and fell.
Q. Which way did he fall?
A. Right across the other cut off rail.
Q. With his body?
A. Yes, sir.
Q. What did he stumble over?
A. Looked to me like the main line rail.
Q. And he fell with his body directly west the cut-off rail?
A. Yes, sir; he fell like this and turned, went over one hand at a time.
Q. He was going from the east side of the track over to the west side of the track, you say?
A. Yes, sir, he was,—I don't know what his intention was, but suppose he was going to get on the engineer's side because other men would be working on the other side.
Q. And he was to the east of the cut-off track after he stepped down from the tender, you say?
A. East side of the rail.
Q. And the engine coming back on the cut-off track?
A. Yes, sir.
Q. Which foot did he put over first?
A. I could not say.
Q. But you say he stepped over the east rail of the cut-over track?
A. Yes, sir.
111 Q. Then you think his foot caught and he stumbled and his body fell across?
A. I did not say his foot caught,—I don't know what he fell over, looked like the rail of the main line.
Q. Which rail, cut-over rail?
A. No, the main line rail.
Q. Then he had put a foot down, as you believe, between the east cut-over rail and the east main line rail?
A. Yes, sir.
Q. And whichever foot it was caused him to fall and his body fell across the west rail of the cut-over track?
A. Yes, sir.
Q. Did he regain his feet?
A. No, sir.
Q. The wheel ran over his body, did it?
A. No, sir.
Q. Where did he have his hands?
A. I did not see where they went,—saw the wheel go over one of them.
Q. How did he fall, right flat on his stomach?
A. No, sir; on his side.
Q. Which side?
A. Apparently on his left side.
Q. Fell on his left side with his body right over the west rail?

A. Yes, sir; he fell pretty much like this and looked like he tried to get himself back, looked like he had presence of mind enough to try to draw his body back between the rails.

Q. How far was he from the engine at that time?

A. He was up against the tank, might say right up to it.

112 Q. Right against the tank?

A. Yes, sir.

Q. Where were his legs when he stumbled, still across the east rail of the cut-over track?

A. I don't know where they were when he stumbled, but when he fell, that pulled both legs over the outside rail.

Q. Which rail?

A. Cut-over.

Q. You mean that pulled both across?

A. No, he had one in there.

Q. And one was east of the cut-over rail?

A. Apparently.

Q. And when he fell he fell his full length?

A. Not exactly.

Q. Did not go down on his knees, did he?

A. I could not state whether he went on his knees, side or how exactly,—I saw him fall and I did what I could to get them to stop.

Q. You don't know whether he fell on his side or just how then?

A. He might have fallen on his knees and turned on his side, but it looked like he fell this way and turned over.

Q. But he fell on his side lengthwise and then drew himself around?

A. Not exactly lengthways.

Q. Standing beside you was Section Boss Miller? He saw it too?

A. I suppose he did, he stood there beside me.

Q. And had just as good a view as you had?

A. Possibly.

Q. You remember distinctly that he was standing beside you?

A. Yes, sir.

113 Q. That is, you were standing on the west side of him and he on the east side of you?

A. Yes, sir.

Q. And about even as far as north and south goes?

A. No, at angles.

Q. Which north?

A. I was north, I think.

Q. A foot or two?

A. Possibly a foot.

Q. How far was Ralph Moore north of you when he fell?

A. He was not north.

Q. How far south?

A. I could not state the distance.

Q. About how far?

A. He might have been eight feet.

Q. You think he was eight feet south of you?

A. Possibly.

Q. What did you do when he fell?

A. I gave the stop sign and hollered.
Q. Which direction did you step then?
A. South.
Q. How far did the engine travel before it stopped?
A. Length of the tank.
Q. Length of the tank and only the length of the tank?
A. I took him off from under the back drive brake beam.
Q. Did you go over on the west side of the track?
A. Yes, sir.
Q. Which end of the engine did you go around?
A. Went around the front south end.
114 Q. And you say the engine after you gave the signal to stop must have moved the length of that tender?
A. I could not say.
Q. About what, your best judgment?
A. Don't know, never measured one.
Q. Will you give us your best judgment of the length of the tender in feet?
A. Never measured one, have no idea.
Q. Is it 100 feet?
A. No, sir.
Q. Is it 10 feet?
A. Yes, sir.
Q. Is it 20?
A. I think they run 14, 16 and 18 feet.
Q. You think that tenders are 14, 16, and 18 feet, but don't remember the length of this particular tender?
A. No, sir; never measured any tender.
Q. About how long were you working with this engine?
A. Three or four days.
Q. What days of the month?
A. 6th, 7th, 8th, and 9th.
Q. Do you know anything about the condition of that tender and coupler on it?
A. In good condition.
Q. I asked you if you knew anything about the condition of the tender?
A. I was working with the engine there, nothing wrong with the engine that I know of.
Q. The coupler working perfectly?
A. As far as I know.
Q. Had you worked it yourself?
A. I cannot say whether I had or not,—I helped the boys
115 and sometimes I did, but can't say whether I did that morning or not.
Q. This was a freight train you were working on?
A. Yes, sir.
Q. Did it have on it a steam hose, such as is used on passenger trains to heat the cars with?
A. Yes, sir.
Q. Which extended down to within 1 or 2 inches of the track?
A. I don't know how low.

Q. About how low within the surface of the track?
A. Possibly six or eight inches.
Q. And it was on the east side of the coupler as the engine backed north?
A. Yes, sir.
Q. Over on the right side of the coupler were two hoses, were there?
A. Yes, sir.
Q. What were they?
A. One signal and the other air hose.
Q. How close to the track did they extend?
A. Could not say exactly.
Q. About how close?
A. Possibly eight or ten inches.
Q. Eight or ten inches from the ground or surface of the track?
A. Yes, sir.
Q. Was the rear end of the engine equipped with the customary hand-holds?
A. Yes, sir.
Q. Were there any grab-irons or hand-holds on the rear end of the tender?
A. Yes, sir; there were grab-irons on there.
116 Q. Whereabouts?
A. One on each end of the tank and the lever made a grab-iron clear across the back.
Q. Were there any hand-holds on the rear end of the tender, on the cross beam?
A. No, sir.
Q. There were no hand-holds there?
A. No, sir.
Q. How far out from the rear of the tender was the rod which operated the chain which was presumed to open the knuckle?
A. The rod ran clear across like this.
Q. How far out from the engine?
A. Could not say,—there were clamps to hold it out possibly an inch or more.
Q. You mean 1 inch from the back of the engine out to the closest portion of the rod?
A. The rod comes up just a trifle and then out,—could not state just the distance the rod is from the beam.
Q. You think 1 to 2 inches?
A. Might be an inch,—enough to get your hand in,—I have had gloves on and caught hold of it.
Q. Do you swear that you ever caught hold of this particular rod on this engine with gloves on?
A. I would not swear I had caught hold of that particular rod on that engine, but I had been riding engines of the 40 class, which are equipped the same way, and have caught hold that rod with gloves on.
Q. Was the rod bent in any way?
A. No, sir; perfectly straight.

Q. And whether or not it operated the chain or knuckle on this particular engine you cannot state?

117 A. No, sir; was not employed in that capacity; it was not my work to be with the engine all the time.

Q. What do you mean by grab-iron, what do you take the term to mean?

A. It is a hand-hold, or any rod or anything that is put on cars for the safety of employees, to get a hold of, or anything they can take a hold of.

—. ——.

A. Yes, sir; or steps, some call them steps, steps up the side of the box car, but they are grab-irons.

Q. And what you understand by grab-iron is such an iron as is used to go up steps of the box car?

A. Yes, sir; or an engine.

Q. They are about two feet long?

A. Yes, sir; some of them.

Q. And extends out from a car 2⅜ inches?

A. That is, on cars, yes.

Q. And on the back of engines the same distance?

A. I should judge so.

Q. All the engines on the Grand Island but this one, had on the back of the tender and have to-day these grab-irons on each side of the coupler?

A. I could not state, may have today, don't think they did at that time.

Q. Don't you know they all did at that time?

A. No, they did not.

Q. Did you ever work with the engine after the day they put them on?

A. Never put them on.

Q. How long before they put them on?

A. I could not say.

118 Q. About how long?

A. Never saw the engine after the injury.

Q. Never saw the engine after that?

A. Might have been on.

Q. But you won't swear they never put them on there?

A. Never saw them.

Q. You won't say you never noticed after that?

A. Can't say, I never saw the engine after that.

Q. Will you say whether or not there were any grab-irons or hand-holds on the rear end of the tender the day Ralph Moore was hurt?

A. According to what kind of grab-irons you mean?

Q. I mean grab-irons put there for the security of employees in coupling and uncoupling, on the rear end of the tender?

A. There were grab-irons there, two on the tank and one clear across the back of the tender.

Q. Were these two what you say on the rear of the tender or on the corner?

A. Catch them right like that,—catch them from this way.

Q. Were there two on the rear of the tender for the security of employees in coupling?

A. I did not say that, said a long one.

Q. You were endeavoring to create the impression that the one which pulled the knuckle was a grab-iron?

A. That is what I said, grab-iron, anything I can grab to I call a grab iron.

Q. You could grab the side of the door?

A. Yes, but could not hold to it.

119 Q. That they use to open the door,—that could be a grab iron too?

A. Of course, that is put there to open and shut the door.

Q. But the rod that goes across is put there to open the knuckle?

A. The pin lifter is there with it.

Q. That is the purpose it is put there for?

A. Search me.

Q. You are a railroad conductor and don't know?

A. Yes, sir; I know,—don't know whether put there altogether for that or not.

Q. You are intending to create for the benefit of this defendant the idea that the rod which operates the pin lifter was a grab-iron?

A. That is what I used it for,—I am not supposed to know, I am not a car repairer.

Q. What is the pin lifter rod on this tender No. 45?

A. It is called a lift rod, chain is connected to the rod in the center.

Q. You mean you pull the rod and when you pull it, it raises the pin in the center?

A. Yes, sir.

Q. Are any other grab-irons on the rear end of this tender except the pin lifter rod?

A. Not that I know of.

Q. How far was he north of the switch-stand as he lay under the engine after it stopped?

A. I don't know.

Q. Give us your best judgment, please?

A. I could not state, I did not pay any attention, I was thinking about getting him out.

Q. Was he 100 feet.

A. Could not have been.

120 Q. Was it 50 feet?

A. No, sir.

Q. Was it 25 feet?

A. Possibly.

Q. You think he was about 25 feet north of the switch stand?

A. Possibly about that far, could not say exactly.

Q. He was not five feet less or five feet more than that from the switch stand?

A. Should not judge he was.

Q. What was it you hollered?

A. Told them that would do, that he had Moore under the tank.
Q. Who did you holler that to?
A. Engineer and fireman.
Q. You were still on the east side?
A. Yes, sir.
Q. Was the fireman looking back?
A. Yes, sir; looking out the window.
Q. What did he do?
A. Transmitted it to the engineer.
Q. How did he do it?
A. Hollered that would do.
Q. Did he keep his head out the window then?
A. I did not watch him, do not know.
Q. You heard him say that would do?
A. Yes, sir.
Q. And you ran right around the south side?
A. Yes, sir.
Q. Were you the first man around there?
A. Yes, sir.
121 Q. Where was he lying?
A. Right under the back driver brake beam.
Q. How far was he from the frog made by the west rail of the cut-off track and the east rail of the main line track?
A. Could not say.
Q. About how far?
A. I could not state the distance because my mind was on something else.
Q. North or south of it?
A. South of it.
Q. You don't know how close?
A. Could not state how close, in fact, I expect I was pretty excited.
Q. Who was the next man you saw there?
A. Section Boss Miller.
Q. Where did he come from?
A. Don't know, which way he came around the engine.
Q. Where was he when you first noticed him after Moore had been injured?
A. In fact, I don't think I noticed him after I took Moore out.
Q. Did you take him out by yourself?
A. Yes, sir.
Q. Did you notice anyone else around there until after he was out?
A. No, sir.
Q. What was the first thing you did?
A. I told the engineer for Christ's sake not to move.
Q. Did he move the engine?
A. When I told him to.
Q. When did he move it?
A. After I got hold of Moore and told him to slip ahead about 1 inch so I could get him out.
122 Q. Anybody help you get him out?
A. No, sir.

Q. Got him out yourself?
A. All but the engine.
Q. Then where was he placed?
A. Outside the track.
Q. On which side?
A. West side.
Q. Who was present then?
A. Miller.
Q. Who else?
A. Engineer, I believe was there in the engine.
Q. Anyone else?
A. All that I know of.
Q. Did the engineer get down out of the engine?
A. No, sir.
Q. Moore conscious or unconscious?
A. Unconscious when I took him out.
Q. How long before he came to?
A. Possibly four or five minutes.
Q. Think he was unconscious four or five minutes?
A. Yes, sir.
Q. Did he lay there beside the track all the time?
A. Yes, sir.
Q. Then what happened?
A. Took him down to a house.
Q. Did you go to the house with him?
A. Yes, sir.
Q. Did he say anything while he was there on the ground or being taken down?
A. Talked about his mother, about wanting to see his mother.
Q. Anything else?
123 A. Don't remember anything else except about his pain.
Q. Did you see him any more after you got to the house?
A. Yes, sir.
Q. Where?
A. In the house.
Q. Who was present?
A. Couple of ladies in the house, don't know their names.
Q. Did he say anything there?
A. He was talking about his pain and his mother.
Q. Anything else?
A. Not that I know of.
Q. Did you see him any more or ever talk to him about the injury?
A. I brought him to St. Joseph.
Q. That same day?
A. Yes, sir.
Q. Did he say anything while being brought to St. Joseph?
A. No, sir; only about his pain.
Q. Were you beside him all the time?
A. Most of the time.
Q. Who else went with you?

A. Brakeman and Dr. Housland.
Q. You were where you could hear everything he said?
A. Part of the time.
Q. Where did you take him after you got to St. Joseph?
A. Ambulance met us at 6th street.
Q. Did you go to the hospital with him?
A. No, sir.
Q. You have never talked with him about how it occurred?
A. Talked with him several times.
124 Q. About how it occurred?
A. No, sir.
Q. Where were you when you talked to him?
A. At Hanover, his house, and here in St. Joseph.
Q. Did you pick up his legs?
A. Nothing matter, only something broken.
Q. Did you pick up his limbs?
A. Picked up one of his hands.
Q. Legs just broken and crushed?
A. Yes, sir.
Q. Picked up his arm or hand?
A. Hand.
Q. Which one?
A. Could not say.
Q. Where was it?
A. In the glove.
Q. Where was it with reference to where it dropped?
A. Could not say exactly, close to the rail.
Q. What did you do with it?
A. Put in on the grain door and took it to the house with him.
Q. Both hands were off, were they not?
A. One was hanging, not clear off.
Q. Then the hand you picked up was clear off his body?
A. Must have been.
Q. Where lying?
A. Along the track.
Q. Inside rail?
A. Could not say.
Q. Who witnessed you pick it up?
A. Don't know.
Q. Did anyone say anything to you?
A. Don't know.
125 Q. You don't remember?
A. Don't remember anything about it.
Q. Where was it when it was put up on the grain door?
A. I don't know. I picked it up, saw no one else was.
Q. Was it before or after the engine was taken away?
A. Engine had made a trip to the depot and gotten the grain door and tarpaulin to carry him on.
Q. Who was present about there at that time?
A. Station Agent Lodigan came up.
Q. Did you go down for the grain door?

A. You bet I did.
Q. And after the engine came back you picked up the hand?
A. Yes, sir.
Q. And after you put it up on the grain door the hand was in the glove?
A. Yes, sir.
Q. You saw it there, no one called your attention to it?
A. No, sir.
Q. You saw it there and just picked up and put it on the door?
A. Laid it on the door.
Q. Nothing was said or no one noticed you do it?
A. Not that I know of.
Q. Don't know where it was?
A. It was close to the rail, don't know whether it was inside or where.
Q. How far from where he was taken out from under the engine?
A. Must have been right there.
Q. Right at that place?
A. Must have been.
125½ Q. Do you know what was done with the hand?
A. Took it to the house with him.
Q. When was it taken out of the glove?
A. I think at the house, but won't say for sure.
Q. Did you see it done?
A. No.
Q. Who took it out?
A. I could not say.
Q. What was done with it?
A. I could not say after we got to the house, went to the hospital with him, I suppose.
Q. When was the last time you saw the dismembered hand and glove?
A. Think up at the house was the last time.
Q. Whose house was this?
A. Could not say, some house they used there as an emergency hospital, could not say whose house it was.
Q. How long were you at the house before you left Marysville with them for St. Joe?
A. I don't know the time there, maybe forty or fifty minutes, maybe longer.

126 Cross-examined by R. A. Brown, Att'y for Def't:

Q. Getting back to the accident. As I understand the track of the Grand Island runs through Marysville almost north and south, while the general course is east and west?
A. Yes, sir.
Q. Did this accident occur north or south of the railway station of Marysville?
A. North,—what would be termed west according to the general course, but north by outsiders.
Q. Your train at that time was coming back to St. Joseph?

A. Yes, sir; headed east.

127 Q. As I understand you, you were trying to pick up three box cars at Marysville at the time Mr. Moore was injured?

A. Yes, sir.

Q. Were these box cars north or south of the point where Moore was injured, while standing there?

A. North.

Q. North of where Moore was injured?

A. Yes, sir.

Q. Did I understand you to tell Mr. Parkinson that you had caught onto these box cars with the forward end of the engine and they had been set off on the side track?

A. The cars were ahead of the engine and the engine was headed this way and I was coming up from the depot and I got on the pilot and the engine went down the main line.

Q. The cars were ahead or south of you?

A. Switched them out over on the other track.

Q. So you first went down with the front of the engine and backed up and set the cars north of the station and then your object was to back down with the rear of the engine and pick the cars up?

A. Yes, sir; and have the cars behind me.

Q. And you stated that you got on the engine and pulled the pin yourself to get the cars loose at that time?

A. Yes, sir.

Q. After the cars had been dropped off on the sidetrack as you have described, did I understand you to say you came back up and walked over the track from the west to the east side or from the south to the north, as the general direction would be over to where the section foreman stood?

A. Yes, sir; I got off the pilot before the engine stopped

128 and watched the cars go over the cross-over and gave the signal.

Q. That is to back up?

A. Yes, sir.

Q. Did the engine come facing you?

A. Went by me and then I walked across the track.

Q. Opposite the switch stand?

A. North.

Q. About how far north of the switch stand?

A. About opposite the frog.

Q. North of the switch stand?

A. Yes, sir.

Q. What was to be done at that time?

A. About the engine?

Q. Yes?

A. The engine was to go down in the yard and get the three cars.

Q. Who was the man who was operating the stand?

A. Moore.

Q. Plaintiff in this case?

A. Yes, sir.
Q. Did you see him draw the switch?
A. Yes, sir.
Q. Did you see anything else he did with respect to giving the signal?
A. After the engine was there?
Q. Yes.
A. After he drew the switch on the fireman's side, he stepped around and gave the fireman the back-up sign.
Q. What kind of sign?
A. Either hand.
Q. Was the engineer looking out or just the fireman?
A. Could not state about the engineer, he was on the other side.

129 Q. Then did he back up?
A. Yes, sir.
Q. As it came around, what did he do?
A. He got on the side of the tender,—got on the east side of the back end of the tender.
Q. As it came around by them?
A. Yes, sir; yes sir; stepped on the step at the end.
Q. When he got on what did you see him do?
A. Saw him reach down and catch hold the lever.
Q. That the lever that holds the coupling?
A. Yes, sir; runs length of the tender.
Q. What next did you see him do?
A. Got off.
Q. Where?
A. On the ground.
Q. On which side?
A. East side.
Q. What then did he do?
A. Started across the track and stumbled and fell.
Q. You say he stumbled and fell?
A. Yes, sir.
Q. What was his object in going on the other side of the track, was it customary in cases of that kind?
A. When you get into the yard it is customary to work on the engineer's side,—it is level ground and the side you can see best,—that is the reason he should have been on the other side of the engine.
Q. And I understood you to say it is your best judgment that he stumbled his foot over the main line rail?
A. Looked to me that way.
Q. And he fell across the rail, but turned to get back in the middle of the track?
A. Yes, sir.
Q. I believe you stated you then gave the signal to stop?
A. Yes, sir.

130 Q. Running entirely across the end of the tender and immediately above the beam is there a rod that is used by trainmen as a grab-iron or hand-hold?

A. Yes, sir.
Q. State whether or not it is perfectly in form and proper?

Objected to by plaintiff's attorney as calling for a conclusion. Attorney for defendant withdraws question.

Q. State whether or not—how much room there is between this rod that runs across with respect to taking hold with gloves on,—if there is sufficient room for a person to do that?
A. Yes, sir; sufficient room,—I have had my hands on with gloves on. I would not say on that particular engine, but on the 40-class engines and they are all built the same way.
Q. You had been out with that engine four days?
A. From sixth to ninth.
Q. This accident occurred in the morning or afternoon?
A. In the morning about 9:15, some time.
Q. During the time that you had been out had you seen any coupling made?
A. It had been cut off and coupled onto the train a couple of times that morning.
Q. During the entire trip?
A. Many times the four days, 25 or 30 times.
Q. Did you observe the man operating the coupling?
A. Don't know that I did, but if anything goes wrong they always notify me.

131 Q. State whether or not you heard anything that would indicate that the coupling apparatus was out of order?

A. Heard no statement to that effect.
Q. As far as you know the coupling apparatus was in good condition?
A. Yes, sir.
Q. The deposition now taken is in the law office of Mytton and Parkinson, St. Joseph?
A. Yes, sir.
Q. And you say you live in Portland?
A. Yes, sir.
Q. Are you going back as soon as you can sign this deposition?
A. Yes, sir.
Q. Do you expect to continue living in Portland?
A. I do.
Q. Was there anyone else around the tender or engine or place of accident at the time it occurred except the train crew?
A. I know of no one except Mr. Miller.
Q. Section foreman?
A. Yes, sir.
Q. Did you see anyone else?
A. I did not.

Redirect examination by Mr. Parkinson:

132 Q. You say it is customary for train men after they pull the switch to cross over back of the engine so as to be on the engineer's side?

A. Yes, sir; to be on the engineer's side as much as possible, and to cross over and give the signal on the other side of the track?

Q. Which is customary?

A. Pull the switch and give the signal when they have crossed over is proper.

132½ Q. Which is customary,—what do all men do?

A. Most all men switching on railroads have different ideas the same as anyone else,—I could not say how all men do.

Q. Do you know the customary way men do?

A. The customary way is the proper way to do, I should think.

Q. You are just judging by yourself?

A. No, sir; it is customary to throw your switch, get on the side of the track you want to work on and give the signal to back up.

Q. Can you state that that is customary?

A. That is my custom.

Q. What do you call customary?

A. Customary way is the usual way.

Q. Do you know what the customary way is?

A. I know how I do it.

Q. Do you know what is customary?

A. Most of men do that way.

Q. But many men do the other way?

A. Yes, many men do the other way.

Q. Have you any objection to leaving the book with us until after the trial?

A. I will take care of the book.

Mr. Brown: No, don't give them the book.

Q. You have just heard Mr. Brown say, "no," and that is your reason for not wanting to leave the book?

A. No, it is not.

Q. But you heard Mr. Brown say not to leave it?

A. Yes, but that is not why I won't leave it.

133 Q. Then why did you say you did not hear him?

A. I did not say I did not hear him, but I denied that, that was why I would not leave it.

Q. But you refuse to leave it?

A. Yes, sir.

Q. What is your reason?

A. Because I may want to refer back to it and leaving it I would never get it. I would not leave it with Mr. Brown any quicker than I would leave it with you.

Q. You had no objection to exhibiting it to Mr. Brown previous to this?

A. He never saw it before.

Q. Until when?

A. Until I went down and brought it up here.

Recross-examination by Mr. Brown:

Q. Did I ever ask you if you had a book?

A. No, sir.

Q. Did anyone in connection with the Grand Island or myself ask you for the book?

A. No, sir.

Q. Did you ever exhibit it to anyone except the honorable attorneys in this case?

A. No, sir.

Q. And that at their request?

A. Yes, sir.

Q. Did you produce the book here for their inspection of your own accord?

A. I did.

GEORGE MILLER, called as a witness on the part of defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown: :

Q. State your name, please?

A. George Miller.

Q. Were you employed by the St. Joseph and Grand Island Company as section foreman at the time Mr. Ralph Moore was injured?

A. Yes, sir.

134 Q. Were you in Marysville on the day of the accident?

A. Yes, sir.

Q. Did you witness the accident to Mr. Moore?

A. Yes, sir.

Q. I wish, Mr. Miller, that you would tell the jury in your way, how you happened to be up there, and where you stood, and just how this accident occurred? Now just tell it in your own way without any suggestions.

A. I was working in the upper end of the yards, that is, above the place where this accident occured, and had a carload of frogs to be unloaded down near this switch, and I went down to show Mr. Moore where I wanted the car stopped so I could unload them on the coal track, is how come me to be there at the time.

Q. Now where were you at the time the accident occurred? Now, for instance, take the switch stand, I believe Mr. Moore was injured at or near the switch stand, or north if it, or somewhere near it,—with respect to the switch stand near where he was injured, where were you standing, or where were you at the time the accident occurred?

A. Well, I was about ten or twelve feet north of the switch stand.

Q. About ten or twelve feet north of the switch stand?

A. Yes, sir.

Q. And where had you been, Mr. Miller?

A. I had been standing right there.

Q. And you say you wanted to see Mr. Moore yourself?

A. Yes, sir.

Q. To set out the frogs, I believe you say?

A. Yes, sir.

135 Q. Now were you there when the engine passed down south, and dropped the cars back, or did you come there after that?

A. No, sir; I was there when the engine came down.

Q. When the engine went down south and dropped the cars back?

A. Yes, sir.

Q. I wish you would tell how this accident occurred as near as you can, what you saw Mr. Moore do, and what with respect to the engine backing up, and how he happened to be hurt, tell it in your own way.

A. Well, when I went down there they brought this engine with the two cars ahead of the engine down the main line, and went down a ways south of the switch point, and then started back with the cars, and Mr. Moore threw—let the engine go up the main line, and threw the switch, and let the two cars go in on the cut-off, on the passing track, and then he threw the switch back, and they pulled the engine down south of the switch points again on the main line, and then started——

Q. About how far did they pull it south of the switch points, tell the jury as near as you can there?

A. I don't just remember how far south, but so as to give plenty of room to throw the switch; it might have been twenty-five or thirty feet; I don't just remember the distance they went south of the switch points.

Q. Go ahead and tell what——

A. (Interrupting.) When Mr. Moore threw the switch back to the cut-off track and gave the signal to back up, and then as the engine backed up, Mr. Moore got on the corner of the tender, on the rear of the tender and had only rode a—I could not tell you just how far, not very far, until he jumped off and went around the tender behind the tender, and then I saw him there, and looking under
136 corner-ways from where I was, you could see him there under the tender, you could see him go down, and then I hollered and stopped the engineer, and did every thing I could to get him to stop.

Q. Did you know why he got on the tender, or what he did when he got on it?

A. No, sir.

Q. What kind of a signal did he give? You say he gave a back-up signal?

A. With his hand this way. (Indicating.)

Q. With his hand?

A. Yes, sir.

Q. Now did you see that signal yourself?

A. Yes, sir.

Q. And who did he give the signal to?

A. To the fireman.

Q. Did you see the fireman at the time?

A. Yes, sir.

Q. What was the fireman doing at that time?

A. He had his head out of the cab and was riding facing back, starting to back up.

Q. Mr. Miller, did you there at any time see Mr. Moore go in

behind the engine, when it was standing still, and attempt to open a coupler or knuckle or anything of that kind?

A. No, sir.

Q. Tell the jury whether or not he did anything of that kind there?

A. No, sir; I never saw anything of the kind at all.

Q. Did you know what caused Mr. Moore to fall?

A. No, sir.

Q. At what point did he fall now, with respect to this switch stand, about where was it that he fell?

137 A. I should judge it would be about twenty to twenty-five feet.

Q. What direction from the switch stand?

A. North.

Q. North of the switch stand?

A. Yes, sir.

Q. Tell the jury whether or not the rear end of the engine, that is, the tender had passed by you at the time he fell.

A. Yes, sir.

Q. What did you observe as to his being in behind the engine after the rear end passed you, what did you observe him doing, if anything, did you see him do anything?

A. I could not see—I could not tell.

Q. Could you see his feet or anything?

A. Yes, sir; when his feet — down—I could not tell what he was doing.

Q. You could not tell what he was doing?

A. No, sir.

Q. With respect to the position where you were standing, where was it that he stepped off of the tender and went behind the tender, was it before he got to you or after he passed you?

A. After he passed me.

Q. After he passed you?

A. Yes, sir.

Q. Could you tell anything about how many steps he took, or what direction he went before he fell behind the engine?

A. No, sir; I could not.

Q. You could not?

A. No, sir.

Q. Did you observe about how far the engine and the tender ran after the signal was given to the fireman or the con-

138 ductor to stop?

A. I don't know exactly, but I don't think it was over 30 feet.

Q. You do not think it was over thirty feet?

A. No, sir.

Q. Did you take any particular notice at all of the distance that they ran after the accident occurred?

A. No, sir.

Q. What kind of a signal did you give? What did you do when you saw this man?

A. Why, I hollered and hollered "Whoa" or something like that, and of course motioned with both my hands, just motioned as near, as I can remember.

Q. Was there anyone else standing over on the same side of the track or near you, or close to you, did you see anyone?

A. Yes, sir; Conductor Pigg.

Q. Do you recall how close he stood to you, do you know?

A. As near as I can remember it was ten or twelve feet, or something like that; I don't just remember.

Q. What direction did he stand from you?

A. North.

Q. He stood north from you?

A. Yes, sir.

Q. Did you hear him say anything?

A. He hollered about the same as I did.

Q. He hollered about the same as you did?

A. Yes, sir.

Q. When the engine had stopped now, after you gave the signal, and the engine had stopped, where was the engine with respect to where you were standing, that is, was the greater part of it, the engine and tender north of you or south of you, or how
139 was that?

A. Why, I think the pilot was almost even with us—I know. I believe we came a step or two south to come around the pilot.

Q. Did you come around the south end of the engine when you went around?

A. Yes, sir; around the pilot on the south end.

The Court: The pilot, you say?

Mr. Brown: Around the pilot? Came around the pilot? That is, you came around south, around the front end of the engine?

A. Yes, sir.

Q. In going around to where this man was?

A. Yes, sir.

Q. Did you aid in getting the man out?

A. Yes, sir.

Q. What was done with him?

A. Why, he was taken from there to Mr. Roseberry's, after we had taken him out from under the engine.

Q. Were you around the scene of the accident shortly after it had occurred?

A. Why, I think about thirty minutes after, I came by there.

Q. Did you notice one of the plaintiff's hands, or a part of his hand, anywhere at any time?

A. No, sir.

Q. You did not notice that part of it at all?

A. No, sir.

Q. Were you there in the afternoon with Mr. Hartigan and the citizens from Marysville?

A. Yes, sir.

Q. Was Mr. Baughman there at the time, was he down there at the time?

A. No, sir; I never saw Mr. Baughman.

140 Q. You did not see Mr. Baughman when you were there at that time?

A. No, sir.

Q. Were there some merchants met down there that afternoon?

A. Yes, sir.

Q. Tell the jury whether or not there was any blood or evidences at the place where the accident occurred upon the track there?

A. Yes, sir; there was some blood along.

Q. Now with respect to the first blood that you found there on the track, where was it that you saw this man fall?

A. I don't just remember how far back, probably ten or fifteen feet, probably back, where the marks showed, where blood began.

Q. You think that the place that he fell, that there was some ten or fifteen feet before the blood marks?

A. Yes, sir.

Q. Were shown upon the rail?

A. Yes, sir.

Q. Did you come to St. Joseph with the plaintiff when he was brought to the city?

A. No, sir.

Q. What was the nature of this track on which Mr. Moore fell, that is, was it ballasted or anything of that kind, or what was the nature of the track?

A. It was principally sand and cinders.

Q. Sand and cinders?

A. Yes, sir.

Q. What was the nature of it with respect to being smooth or otherwise?

A. Smooth; solid.

Q. Smooth and solid?

A. Yes, sir.

141 Q. How do you know that it was smooth, Mr. Miller?

A. Because it was level with the top of the tie.

Q. Had you ever worked upon it to do anything about it especially?

A. Yes, sir.

Q. When?

A. Several times.

Q. Prior to this accident?

A. No, not right away before, but several times during the four or five years I was there.

Q. That you were where?

A. At Marysville.

Q. You live now where, at Lillis?

A. Yes, sir.

Q. How far is Lillis from Marysville?

A. 27 miles.

Q. And you say now that you are working for the U. P.?

A. Yes, sir.

Q. You worked for the Grand Island then when you were in Marysville, did you?

A. Yes, sir.

141½ Q. You were working for the Grand Island that morning?

A. Yes, sir.

Q. You were working for the Grand Island that morning?

A. Yes, sir.

Mr. Brown: He was employed there.

142 Q. And who was with you at that time, do you remember?

A. I remember one fellow is about all.

Q. Who was it?

A. Charley Boufette, as near as I can remember.

Q. Where is he?

A. I could not tell you.

Q. Was he there that morning?

A. Yes, sir; I think so.

Q. Down with you?

A. No, sir.

Q. What were you doing in that immediate vicinity?

A. I went down to show them where to set that carload of frogs.

Q. Who had charge of that train?

A. Mr. Pigg was the conductor.

Q. He was the manager of the train, wasn't he?

A. Yes, sir.

Q. And your motive in going down there was to go and talk to the manager of the train about where they would set it, or what was your motive?

A. My motive was to go down there, that is, to the train crew and tell them where to spot the carload of frogs.

Q. Where to put the carload of frogs?

A. Yes, sir.

Q. Did you see Pigg there?

A. Yes, sir.

Q. Did you go up and talk to Pigg about where it was to be set?

A. No, sir.

Q. Why not?

A. It was not necessary.

Q. Did you talk to any of the train crew?

A. I saw Mr. Moore.

143 Q. Could you talk to the engineer or fireman or switchman or brakeman, the same as you would to the conductor?

A. Supposed to talk to the brakeman, or conductor.

Q. Would you talk to the engineer where it was to go?

A. No, sir; either to the brakeman or conductor.

Q. Either to the brakeman or conductor?

A. Yes, sir.

Q. When you went down there you saw Mr. Moore there?

A. Yes, sir.

Q. Where did you first see him?

A. When he come down on the open to the main line.

Q. Whereabouts did you see him go to?

A. Go to that switch, main line switch.

Q. On the main line?
A. Yes, sir.
Q. You mean the cross-over switch?
A. Come down to the main line switch, and he was going to the cross-over.
Q. Where from?
A. From the main line.
Q. Going in a southerly direction?
A. Coming from the north on the main line.
Q. Did you notice what he was coming with?
A. Yes, sir.
Q. What?
A. Two cars ahead of the engine.
Q. Two cars ahead of the engine?
A. Yes, sir.
Q. Pushing it down?
A. Yes, sir.
Q. What did they do with those cars?
A. Made a drop in on the cut-off with them.
144 Q. How far down south did they take those cars, south of the switch?
A. I could not tell you.
Q. What were you doing at that time?
A. Standing there.
Q. Where?
A. North of the switch.
Q. How far?
A. Ten or twelve feet.
Q. How long were you standing there north of that switch?
A. Until after the drop was made.
Q. How many minutes?
A. I don't know.
Q. About how many?
A. I don't know.
Q. Haven't you testified how long you stayed there?
A. No, sir.
Q. You never did?
A. No, sir.
Q. Did you give your deposition in Marysville, Kansas?
A. Yes, sir.
Q. Did you in that deposition state how long you were standing there at the switch?
A. I think not.
Q. You think not?
A. No, sir.
Q. Now as to the time you stood on that particular point, you don't know?
A. No, sir.
Q. Might have been ten minutes or might have been twenty minutes?
A. No, sir; it was not that long.

Q. Five minutes?
A. Well, I don't know the exact time.
Q. Well, listen, Mr. Miller. Your deposition was taken
145 at Marysville, Kansas, about the 8th day of April of last year, wasn't it?
A. I don't remember the date it was taken.
Q. Your deposition was taken, wasn't it?
A. Yes, sir.
Q. And it was sent out by the notary and you read it over, and after you had read it over you signed it, didn't you?
A. Yes, sir.
Q. And your memory was better then than it is now, wasn't it, or was it?
A. What is your question?
Q. Was your memory better in April of last year than it is now or not?
A. Probably it was a little bit.
Q. Just a little. Is that your signature, "George Miller"? (Handing witness a paper.)
A. Yes, sir.
Q. Sworn to before George Loch, Notary Public?
A. Yes, sir.
Q. Was this question asked you: "How long had you been down in that vicinity? A. Probably twenty minutes." Was that question asked you and did you make that answer at that time?

Mr. Brown: What vicinity does it refer to, Mr. Mytton?
Mr. Mytton: This man is going to answer the question.

A. It probably was.
Q. Then you were down there twenty minutes in that vicinity?
A. Might not have been at the same place, in that vicinity, would mean around there somewhere near there.
146 Q. You went down there for the specific purpose of conveying a message to the employees of that company?
A. Yes, sir.
Q. You got down there to where Ralph Moore was?
A. Yes, sir.
Q. Now, Ralph Moore was in the vicinity of that switch, and that was where you conveyed the message to him, wasn't it?
A. Yes, sir.
Q. Now, I will ask you whether or not it is true that you were in that vicinity for twenty minutes or not?
A. Probably was twenty minutes.
Q. Probably was?
A. Yes, sir.
Q. Now, what were you doing there twenty minutes in that vicinity?
A. Waiting on this—to get to speak to Mr. Moore, and probably waiting until they got some switching done, so as to go down in that particular place or point.
Q. Waiting to deliver the message to Moore?

A. Yes, sir.
Q. You did deliver the message to Moore?
A. Yes, sir.
Q. What did you tell him?
A. Told him where I wanted this carload of frogs spotted at.
Q. Where did you tell him you wanted it set?
A. On the coal track.
Q. Now, do you remember whether you stood in one place while you were down there or not, or whether you moved around?
A. Probably moved a little bit.
Q. But not very much?
A. No, sir.

147 Q. So there will be no question about it, Mr. Miller, I will ask you if this question was asked you: "Did you stand in one place when you came down there? A. Not exactly, probably moved a little bit." "Q. What do you mean by a little bit? A. Probably stepped around a little bit." "Q. How far north do you think you went? A. Probably three steps." Now, so there will be no question about it, after you went down there, I understand, Mr. Miller, that you stood in that immediate vicinity, within two or three steps for about twenty minutes?
A. No, sir.
Q. Now you say it was not twenty minutes, but you say it was less than five, now?
A. Not in the same step. I probably moved around some.
Q. In that immediate vicinity?
A. Somewheres in there, yes.
Q. (Reading:) "Q. You had been standing in one place about twenty minutes? A. Something like that." Was that question asked you and you made that answer, didn't you?
A. I don't just remember what the answer was.
Q. Did you talk to any other human being around there except Moore?
A. No, sir; not at the time.
Q. Not at that time?
A. No, sir.
Q. Did you talk to the Conductor, Pigg, before the accident?
A. No, sir.
Q. You did not?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.
Q. You have no recollection whatever of saying to Pigg, "Hello, Pigg," and he saying to you, "Good morning, Miller?"
A. No, sir.

148 Q. And that did not take place, did it?
A. Not in my knowledge.
Q. When you saw Moore standing by the switch, how far north do you say you were of the switch?
A. Probably ten or twelve feet.
Q. And east of the track?

A. Yes, sir.
Q. Whereabouts at that time was Pigg, if you know?
A. Pigg came across from the west side of the track to cross the——
Q. (Interrupting.) Was that before the engine went over the switch or when it came back?
A. Just about the time the engine started back, if I remember right.
Q. As the engine was going north?
A. Yes, sir.
Q. To come over the switch?
A. Yes, sir.
Q. You think that Pigg crossed?
A. Pigg stepped across to the east side.
Q. And south of the engine?
A. No, sir.
Q. Where, north?
A. North at that time.
Q. Do you want to tell this jury that as the engine was backing north, that you saw Pigg walk north of that engine, of that moving engine?
A. Yes, sir; just stepped north of the tender, across to the east side.
Q. And how far south or north of you, where was he?
A. He was about ten or twelve feet north of me.
Q. He was about ten or twelve feet north of you?
A. Yes, sir.
149 Q. And when he came over there, what did he do?
A. He stood there until after the accident occurred?
Q. After it occurred?
A. Yes, sir.
Q. Now then you say that you saw Moore after he threw the switch, get on the engine?
A. Yes, sir.
Q. And after he had stepped on the engine he deliberately jumped right down between the tracks?
A. He got on the tender, the ladder of the tender.
Q. And then he jumped down between the tracks?
A. He jumped down and went around the corner of the engine behind.
Q. And that was all you saw him do?
A. Yes, sir.
Q. And you were in plain view of him?
A. Yes, sir.
Q. And at the time he was struck?
A. I could see his feet after he fell was all. I could not see after he got behind the tender, what he did.
Q. How far north of where you were standing was the north end of the tender?
A. I don't just remember how far.
Q. You don't undertake to tell this jury what that man was doing when he went in there between or back of the tender, do you?

A. No, sir; I don't know what he was doing.
Q. If he went to fix the knuckle, you cannot tell the jury whether he did or not, can you?
A. No, sir.
150 Q. And you were about how many feet south of where he was?
A. I don't just remember how many feet.
Q. What, to the best of your recollection?
A. It would be fifteen or twenty feet.
Q. Fifteen or twenty feet?
A. Something like that, I suppose; I don't know.
Q. So that the length of the tender practically obstructed your view, didn't it?
A. No, sir; when he fell.
Q. What was the length of the tender, could you say?
A. I do not know.
Q. About what would you say was the length of the tender?
A. I never measured them; I cannot tell.
Q. Well, you have been around railroads, and ought to know about what the length of that tender was?
A. I could not say. I never measured that.
Q. You would not say the length of that tender was over 22 feet?
A. I would not say; I don't know.
Q. You would not swear it was over twenty-two feet?
A. I would not swear either way, because I don't know.
Q. But anyway you are positive that your view was obstructed of what he was doing back there?
A. Yes, sir.
Q. Now, then you say you were twenty feet south of him, and the last you saw of him was when he went back between the tracks apparently, and you could see him take three or four steps in the center of the track, is that correct?
A. I saw him walk around behind the engine, the tender, yes.
151 Q. You saw him walk behind the engine?
A. Yes, sir; the tender.
Q. Where did he walk from?
A. Well, when he jumped down on the corner and went right around behind the engine.
Q. He got down on the ground first?
A. I saw him there. I don't know what he did.
Q. You saw him there?
A. I saw him there under the corner.
Q. Did you squat down so you could see under?
A. No, sir.
Q. Do you undertake to tell this jury there, that as you were twenty feet north there, and with the wheels between you and everything, that you could see him walking back in the center of the track?
A. You could see anywhere here; yes, sir. (Indicating.) You could see his feet.

Q. When you were twenty feet north of him?
A. Yes, sir; twenty feet south of him. He was twenty feet north of me.
Q. Would the wheels obstruct your view or not?
A. No, sir.
Q. Would not?
A. No, sir.
Q. Did you see the conductor move any place or do anything when he was standing there, and he crossed over, what was he doing?
A. Not until the accident occurred.
Q. Not until it?
A. No, sir.
Q. He stood right there in his tracks?
A. Yes, sir.
152 Q. You and he never spoke?
A. No, sir.
Q. About how far north of the cross-over switch would you say the conductor was?
A. North of the main line switch you mean?
Q. Of this switch that was thrown, the cross-over switch?
A. Probably twenty or twenty-four feet, something like that.
Q. How?
A. About twenty or *twenty or* twenty-four feet north of there.
Q. What do you say, twenty or twenty-four feet?
A. Well, I should judge about that. I did not measure it.
Q. You did not take any accurate measurement at any time, and you are giving just simply your best impression?
A. Yes, sir.
Q. Without trying to fix in mind at that time, or any time the exact distance?
A. Yes, sir.
Q. At the time that the signal was given by Moore, as you say, whereabouts was Pigg?
A. He was on the west side of the track.
Q. Standing still?
A. I don't know. He come across from that side at the time the engine started to back up.
Q. How far north of that switch, Mr. Miller, would you judge that Moore was when you say that he stepped on the ladder?
A. North of the switch, you mean?
Q. Yes.
A. Probably fifteen feet, or something like that. I don't know just exactly.
Q. Fifteen feet?
A. Probably that far.
153 Q. Well, the engine was standing still at the switch, wasn't it, before it backed up, wasn't it?
A. Pulled down below the switch.
Q. And was standing still?
A. Then it backed up.
Q. And standing still?

A. I suppose it had to stop to back up.
Q. And was standing still?
A. I don't remember, standing still.
Q. Don't you remember that engine stood still after it crossed over the switch going south?
A. Sure it had to stand still to stop.
Q. You saw it stand still?
A. No, sir; I never paid any attention to it standing still.
Q. What were you paying attention to?
A. I was talking to Moore there.
Q. You only said scarcely a few words to Moore, didn't you?
A. Well, probably said more to him, too. We was talking there.
Q. Why were you carrying on a running conversation?
A. I don't know what else that I said outside of about spotting this car, probably spoke something.
Q. Do you remember of saying anything else?
A. I don't remember.
Q. You do not?
A. No, sir.
Q. Do I understand you to tell this jury that you at no time, saw the engine standing still at the switch there?
A. I never noticed it as it stood still; no, sir.
154 Q. Then all the time you ever saw it, it was moving?
A. Yes, sir.
Q. And it only moved in two directions, one when it was going south, and one when it was moving back?
A. Once when it was going south, and then when it brought the cars back, and then the engine went south again, and then come back again.
Q. But at no time did you see the engine standing still?
A. I never took any particular notice of it.
Q. Did you see it stand still or not?
A. I might have.
Q. Do you remember whether you did or not?
A. I remember of seeing it standing still after Moore was hurt.
Q. I mean before Moore was hurt?
A. I never took any particular notice of it to see it standing still.
Q. Then if you did not see it stand still—you say that you saw it moving south, and then north again, and then went south again?
A. Yes, sir.
Q. And you never saw it come to a dead stop at any time?
A. I never took no particular notice to watch it.
Q. But you never saw it stand still or come to a dead stop at any time, did you or not?
A. I saw it stop when Moore got hurt.
Q. I mean until after he was hurt?
A. No, sir.
Q. That was the only time you saw that particular engine standing still?

A. Yes, sir; the only time I paid attention to it stopping still.

155 Q. You stood up at the time you say you saw his feet, when you were twenty-feet away?

A. Yes, sir.

Q. Standing erect?

A. Standing facing north; yes, sir.

Q. And he was in the center of the track?

A. Yes, sir.

Q. And you could not see what he fell over?

A. No, sir.

Q. You remembered that you hollered and flagged the train?

A. Yes, sir.

Q. And that the engine moved about thirty feet?

A. Something like that.

Q. That was before it came to a dead stop?

A. Yes, sir.

Q. Now, which way did you go around there to help get him out?

A. South of the pilot.

Q. South of the pilot?

A. Yes, sir.

Q. What would you think was the entire length of the engine, including the tender?

A. I don't know.

Q. The engine and tender would be in the neighborhood of forty or forty-five feet in length, wouldn't it?

A. Probably would; I don't know.

Q. That is your judgment. And you went around the south because it was nearer to get to where he was pinned under the rear of it, that is correct, isn't it?

A. Yes, sir.

Q. Did you notice which way Pigg came?

A. He went around with me.

156 Q. He went around south?

A. Yes, sir.

Q. When you got up to him, did you notice where his feet were sticking up?

A. To the east.

Q. Where in reference to the engine, or rather the tender?

A. Between the tender and the back wheel.

Q. Did you at any time assist in taking any measurements, Mr. Miller?

A. Yes, sir.

Q. And when did you assist in taking those measurements?

A. That afternoon.

Q. At whose request, Mr. Hartigan's, the claim agent?

A. Yes, sir.

Q. And you were still in the employ of the U. P. at that time?

A. The Grand Island; yes, sir; of the Grand Island.

Q. Of the Grand Island at that time, I mean?

A. Yes, sir.

Q. And do you know Sam Baughman?
A. Yes, sir.
Q. And you don't undertake to tell this jury that Sam Baughman was not there at any time, do you?
A. I say, I did not see Sam Baughman there.
Q. Did you see him there in the afternoon?
A. No, sir.
Q. Did you see him there in the morning?
A. No, sir.
Q. But he might have been there and still you might not have seen him?
A. Sure. All I am saying, I did not see him there.
157 Q. Did you go over to Roseberry's house?
A. Yes, sir.

Mr. Miller, I will ask you whether or not these questions were asked you, and these answers were made by you at the time you gave your deposition before:

"Q. Did you see the conductor move any place or do anything while he was standing there?
"A. No, sir.
"Q. You never spoke to him until after the injury?
"A. No, not until it occurred.
"Q. When it occurred, how far were you from the switch stand?
"A. Probably twenty feet north.
"Q. On what side of the track?
"A. On the east side."

Mr. Brown: I want to object to that unless it is for the purpose— —
Mr. Mytton: Were those questions and answers asked you and did you make those answers?
Mr. Brown: There is nothing in contradiction of that, your honor.
Mr. Parkinson: It is not exactly as he stated here, when he started out, I think.
The Court: Objection overruled.
To which action and ruling of the court the defendant at the time then and there duly excepted and still excepts.

Q. Do you remember whether those questions and answers were asked you?
A. Yes, sir; as near as I can remember.
158 Q. Did you make those answers in reply to those questions?
A. I suppose I did; yes, sir.

"Q. How far north of the switch was he?
"A. Probably thirty feet."
"Q. You were twelve feet north of the switch, and he was north of you how far?
"A. About twelve feet north of ——"
Did you make those answers to those questions at that time?
A. I don't remember.
Q. You don't remember?
A. No, sir.
Q. But if you did make them, they were true at that time, were they not?

A. Yes, sir; probably was.
Q. Sir?
A. Yes, sir.
Q. "Q. Had Moore given the signal when the conductor started across from the west to the east side of the track?
"A. Yes, sir."
Did you make that answer to that question?
A. Yes, sir.
Q. "Q. On the back and east side he got on the *the* ladder and then what did he do?
"A. He jumped down behind the engine."
Did you make that answer to that question?
A. The tender probably wasn't it? The tender, as I remember, that I made it.
Q. "Q. Did the engine start to move back when he got on the ladder?
"A. Yes, sir."
"Q. Where was the engine when he got on the tender with reference to the switch?
"A. Probably on the switch, about a length by."
A. The engine was probably on the switch and the tender a length by.
Q. Did you make those answers to those questions?
A. Yes, sir.
159 "Q. You think when he started to climb on the ladder he was about twenty feet north of the switch point?
A. Yes, sir.
"Q. Which do you think you were, twelve or twenty feet north of the switch point?
A. I could not say, exactly.
"Q. He was just about even with you when he got on the ladder?
A. Yes, sir.
"Q. You saw him as he was running behind the engine?
A. Yes, sir.
"Q. Did you look underneath the engine?
A. I could see him standing up.
"Q. How far was he north of you when he fell?
A. He ran a few steps behind the tender. About eight or ten feet."
Q. Did you make those answers to those questions?
A. About; I did not say exactly, did I?
Q. About that?
A. Yes, sir; about.
"Q. There was an interim when he got on the ladder that you could not see him?
A. At the time he went behind, of course, I could see nothing but his feet where he was running.
"Q. Did you stoop down to see his feet?
A. No, sir.
"Q. Stood up and saw his feet?
A. Yes, sir.

"Q. You could see him running about eight or ten feet?
A. Yes, sir.
"Q. Where was he with reference to the track?
A. About the center."
160 Q. Did you make those answers to those questions then?
A. Yes, sir.
"Q. The tender had passed about eighteen feet north of you when he fell?
A. Yes, sir.
"Q. That brought the engineer and fireman about even with you?
A. Yes, sir."
Q. Is that correct?
A. Yes, sir.
Q. Did you say anything at that time, did you holler?
A. Yes, sir.
Q. Sir?
A. I hollered, sure, when he fell; yes, sir.
Q. Was this question asked you?
"Q. What did you holler?
A. I don't remember."
Q. Do you remember of making that answer to that question?
A. No, sir; I do not.
Q. You don't remember that?
A. No, sir.
"Q. How far had the engine gone before it stopped?
A. About thirty feet.
"Q. That is the engine moved about thirty feet north after you hollered, 'Stop' and 'Hold' and gave the stop signal with your hands?
A. Yes, sir."
Q. Did you give the stop signal?
A. Yes, sir.
Q. Did Pigg give any signal?
A. Yes, sir.
Q. Both of you gave a signal?
A. Yes, sir.
Q. How near to you at that time was Pigg when he gave the signal?
A. I don't remember, ten or twelve feet, something like that.
161 Q. Anyhow?
A. I don't remember. I have never measured the distance.
"Q. The engine went north of you?
A. Yes, sir.
"Q. How far?
A. About thirty feet.
"Q. You think the front of the engine was about thirty feet north of you when it stopped?
A. No, sir."
Q. Did you make that answer? (Reading.)
—. ——.

Q. The pilot of the engine was about twenty feet north of you when it stopped?
A. Yes, sir.
"Q. Had Mr. Pigg passed in front of the engine?
A. Yes, sir."
Q. Did you make those answers to those questions at that time?
A. He passed in front to the west side.
"Q. Had Mr. Pigg passed in front of the engine?
A. Yes, sir."
A. After the accident occurred, from the east side to the west.
Q. At that time?
A. From the east side to the west?
Q. Yes, sir?
A. Yes, sir.

Thereupon Court took an adjournment for the day.

Morning Session of Court, February 17th, 1912, Before Judge Rusk and a Jury.

Mr. Miller still on the stand.

162 Mr. Mytton: I think we are through for the present with Mr. Miller.

Redirect examination by Mr. Brown:

Q. Mr. Miller, I believe you stated yesterday that you were standing somewhat north of the flag stand or the switch?
A. Yes, sir.
Q. At the time of the accident?
A. Yes, sir.
Q. And that Mr. Pigg, the conductor, stood near you; that is some ten or twelve feet north of you, that is, as you recollect?
A. Yes, sir.
Q. And when Mr. Pigg came up there, do you know whether he spoke to you or have you any recollection on the subject?

Mr. Parkinson: Your Honor, he has gone all over that.
The Court: I think we have been over that part of it.
Mr. Brown: Now, your honor, he was asked by the other parties if Mr. Pigg spoke to him, and I believe he said he never. I want to ask him if he means he did not speak to him, or if he has any recollection on the subject at all.
The Court: That was brought out on cross examination, was it?
Mr. Brown: Yes, sir, it was brought out on cross examination.
The Court: Objection overruled.

Mr. Brown: Do you know——

162½ Mr. Parkinson: We object to any statement by Mr. Brown what he knows.
The Court: Do not lead him, either.

Q. What is it you mean to say? Did he speak to you, or what do you know about it?

A. I have no recollection of him speaking to me. He might have, but I have no recollection of it whatever.

WILLIAM H. TEMPS, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?

A. William H. Temps.

163 Q. Were you the fireman upon the engine that ran over or backed against Mr. Moore, the plaintiff in this case?

A. I was.

Q. How long had you known Mr. Moore at that time?

A. About six months.

Mr. Mytton: How?

A. Six months.

Q. Tell the jury whether or not he had worked in your train gang during that time?

A. What?

Q. Speak a little louder. Tell the jury whether or not he had worked with you on the road during that period of time?

A. He had been working with us about a week and a half.

Q. Had he ever worked with you before that time, that is on your train?

A. Yes, sir; off and on, he had been working with us.

Q. What I am getting at, during the entire period of time that you have known him, he had from time to time been on trains that you were operating as fireman?

A. Yes, sir; he had.

Q. The diagram or plat that lays here upon the floor, Mr. Temps, is supposed to represent the tracks of the Grand Island Company at Marysville, Kansas. The point that I indicate here on the floor is supposed to be the switch stand, or the switch which Mr. Moore threw before the engine backed up. The tracks at that place,

164 I believe, run practically north and south, do they not, through Marysville?

A. Yes, sir.

Q. Please speak a little louder?

A. Yes, sir.

Q. Now, I wish you would tell, Mr. Temps, without my suggesting to you or leading you in any way, tell the jury as near as you can what you know about this accident; that is, what Mr. Moore did before the accident, what you did before the accident, and how it occurred as near as you can? Just tell it in your own language.

A. Well, we had two cars——

Mr. Mytton: Talk loud, Mr. Temps, please.

A. We had two cars, got one off of the house track, and one off of

the team and had them ahead of the engine. We come out of the house track and come up the main line, and shoved them ahead of us, pulled over that switch, and made the drop of them. Moore pulled the switch, and somebody cut them off; I don't know who it was. It was not in my sight, and the cars went through the cut off, and we went down the main line. Then we come back going south, and Moore threw the switch, gave a signal to back up, and got on the step of the ladder, raised up the pin, and then got off and ran on in front of it, and that was the last I saw of him until I heard the conductor and Mr. Miller holler that we caught Moore. I gave the signal to the engineer as quick as I could, and told him to stop, and he stopped, and he was just—I got down to the step—I did not get on the ground, and I saw him—I saw him and I got back on. He was between the tender and the engine, right under the brake beam. We had to slack up a little—we had to slack ahead a little, about a foot, to get him out. The conductor pulled him out, and after we pulled him out, we went to the depot, and got Mr. Lonergan and picked him up, and brought him to some house. I don't know the name.

Q. Mr. Temps, after the car had been set down north, or after the engine had gone back over the point of the switch that you have described, which you say was thrown by Mr. Moore, how far south of the point of the switch did the engine and tender go, if you know?

A. I don't know how far it went over the switch.

Q. How is that?

A. I could not tell how far that it did go over the switch.

Q. I mean, have you any idea about that at all?

A. No, I haven't.

Q. You don't know how far you went over it?

A. No, sir.

Q. Did you go far enough to clear by the switch points?

A. Yes, sir.

Q. Now, after your engine had gone over the switch points, tell the jury whether or not it stopped?

A. Yes, sir; it stopped.

Q. Which side of the engine were you on, as fireman?

A. On the left side.

Q. That would be on the east side at that place, would it?

A. Yes, sir.

Q. And what side was Mr. Moore on?

A. He was on the east side.

Q. What side was the switch stand on?

A. On the east side.

Q. On the east side?

A. Yes, sir.

Q. Now, after your engine went south and stopped, what did you see Mr. Moore do, if anything?

A. He throwed the switch and gave a signal to back up.

Q. What kind of a signal did he give?

A. He motioned with his arms.

Q. What do you call the signal?
A. What do I call it?
Q. Now, what kind of a signal, a forward signal, or back-up signal, or what was it?
A. A back-up signal.
Q. A back-up signal?
A. Yes, sir.
Q. Who did he give that signal to?
A. He gave it to me.
Q. And when the signal was given to you, what did you do?
A. I told the engineer to back up.
Q. Then what was done?
A. He backed up and Moore got on the step.
Q. Got on what step, now, did he get on?
A. On the east side of the step at the hind end of the engine.
Q. Were you in a position where you could see him at that time?
A. Yes, sir.
Q. Now, what did you see him do when he got on the step at the rear end or the side of the tender?
A. He raised the pin.
Q. How did you see him raise the pin? What did you see him do?
A. He grabbed around and lifted up on it.
167 Q. Grabbed around what?
A. Right behind the tender, got hold of the grab-iron to raise the pin.
Q. Got hold of the grab-iron?
A. Yes, sir.
Q. Was there a rod or something that runs across there that you lift the pin with?
A. Yes, sir.
Q. And was that what you meant to say that he took hold of?
A. Yes, sir.
Q. And what did you see him do? What movement did you see him make? What movement did you see him make?
A. All I saw him make was he raised up on the lever.
Q. Raised up on the lever?
A. Yes, sir.
Q. Could you see whether it raised the pin or anything about that from where you were?
A. No, sir.
Q. Now when you saw him do that what did he next do?
A. A. Jumped off and ran up the track and ran along it.
Q. Off of the tender?
A. Yes, sir.
Q. And then run in front of what or behind what or what was it?
A. Behind the tender.
Q. Did you see him any more after that?
A. No, sir.
Q. What next attracted your attention after he went behind?
A. The conductor and Miller hollered.

Q. And at the time he got off of the tender and went behind it, what was your engine doing all the time, during that time?

A. Backing up.

168 Q. About what rate of speed was your engine going after you started to back up, and were backing over the switch and down the track as you described, as near as you can estimate—if you have any idea how fast it was going?

A. After he got off of the tender?

Q. Yes, sir; I mean at the time he got off of the tender and stepped right around there?

A. About four or five miles an hour.

Q. About four or five miles an hour?

A. Yes, sir.

Q. How far was it that you were going down after the other two cars, how far down were they?

A. I don't know how far they were.

Q. You don't know how far they were?

A. No, sir.

Q. Was it your intention to go down and get those cars on the rear end of the tender, was that the object, do you know?

A. No, sir.

Q. After the accident had occurred, you say, that Mr. Moore was taken to the depot, or what did you say was done?

A. Well, he was taken to some neighbor's house.

Q. And what did you do, did you get off of your engine there at any time?

A. No, sir.

Q. You did not get off of the engine at all?

A. No, sir.

Q. Did you look at the accident, where the accident occurred, make any examination there at all?

A. I did not.

169 Q. Did you see any part of his hand or anything else to indicate where the accident occurred?

A. No, sir.

Q. You had nothing to do with that part of it at all?

A. No, sir.

Q. How long had you been operating that engine, Mr. Temps, or been on that engine as a fireman, on this trip, I mean?

A. I could not tell how long I had been on it.

Q. Do you know where you got that engine?

A. We got it at Hanover.

Q. You got it at Hanover?

A. I think.

Q. Do you know what day you got it?

A. No, sir.

Q. You don't recall that?

A. No, sir.

Q. Have you any idea how many days you had been in charge

of the engine as fireman or been upon the engine as fireman at the time the accident occurred?

A. How many days?

Q. How many days had you been upon the engine as fireman on that trip, I mean? I mean during the time you had it out that time?

A. No, sir; I don't know how long we had it out.

Q. You don't know how long you had it out?

A. No, sir.

Q. Tell the jury whether you had ever known of anything being wrong with the coupling device at the rear end of the tender?

A. No, sir; I don't.

Q. Tell the jury whether or not you had observed the
170 men, that is the brakeman in charge of your train doing the switching work, operating the coupler on that trip before that? Had you observed them operating it before that, I mean?

A. Before that?

Q. Before Moore was injured?

A. No, sir; I don't.

Q. I mean, had anybody coupled a car on the rear end of the tender on that trip, or before that?

A. Yes, sir.

Q. Had you observed the brakeman doing that?

A. Yes, sir.

Q. I wish you would tell the jury how they did that, whether they went in between and operated it, or whether operated it from the side?

A. They operated it from the side.

Q. Did you ever know or hear of anything being wrong with that coupler prior to the time of the accident?

A. I had not.

Q. Did you make an examination of the coupler after the accident or look at it at all?

A. I have not.

Q. Were you present in St. Joseph when an examination was made of it?

A. Yes, sir.

Q. Who was present at that time?

A. At St. Joseph?

Q. Yes, sir; when the examination was made?

A. I could not tell who was there.

Q. About how many were there?

A. I could not tell that.

Q. And how soon after the accident was it that this examination was made in St. Joseph?

A. As soon as we got in.

171 Q. As soon as you got in?

A. Yes, sir.

Q. Tell the jury whether or not you remained on the engine and brought it into St. Joseph?

A. Tell them what?

Q. Whether you remained upon that engine and came into St. Joseph with it?

A. Yes, sir; I come into St. Joseph with that engine.

Q. Was that the engine that brought Mr. Moore to town?

A. Yes, sir.

Q. Had there been any repairs of any kind made upon the rear end of that tender before it got to town?

A. No, sir.

Q. Had there been anything done to it whatever, or any repairs made upon it before these men examined it down there?

A. No, sir.

Q. There had not been?

A. No, sir; there had not.

Q. When this examination was made down there, tell the jury whether or not you observed whether the coupling worked properly at that time, when the examination was made by these men?

A. Yes, sir; it worked properly when I saw them work it.

Q. Did you observe anything whatever wrong with it at that time?

A. No, sir.

Q. Who was your engineer at the time of the accident?

A. Hawkins.

Q. Hawkins?

A. Yes, sir.

Q. And he was on the right side of the engine, was he?

A. Yes, sir.

172 Q. Who first attracted your attention after Moore was caught, who was it that called to you or attracted your attention?

A. I could not tell whether it was Miller or the conductor.

Q. Were they both there?

A. They were both there; yes, sir.

Q. Where were they standing, if you noticed?

A. On the east side of the switch.

Q. On the east side of the switch?

A. Yes, sir.

Q. Have you any idea about how far your engine ran after you saw this man jump off and before you heard the hollering?

A. After he jumped off?

Q. Yes, and then before you heard the hollering or the signal to stop?

A. About twenty feet.

Q. Did you notice what the engineer did when the signal was given to stop, what he did in the engine?

A. Yes, sir; he put on the air and throwed her ahead.

Q. And throwed her ahead?

A. Yes, sir.

Cross-examination by Mr. Mytton:

Q. Now you saw Ralph Moore right at the cross-over switch, did you, Mr. Temps?

A. Yes, sir.

Q. And the engine just went far enough south of that switch so as to clear the switch a few feet, then it came back?

A. I don't know how far it went over the switch.

Q. Well, but it just went a few feet, didn't it, now?

A. I don't know that, whether it went a few feet or went ten feet.

173 Q. How?

A. I could not tell how far it went over the switch, no, sir.

Q. Could you give any impression?

A. No, sir.

Q. No impression whatever?

A. No, sir.

Q. I will ask if you testified on the 8th day of April at Marysville, Kansas, as follows:—

A. As what?

Q. Listen to these questions, please. You testified in your deposition at Marysville, Kansas, didn't you?

A. Yes, sir.

Q. You gave your deposition there?

A. Yes, sir.

"Q. (Reading.) Did you see anybody standing alongside the track on the east side of the main line besides Ralph Moore when you made the drop? A. Not then. Q. If anybody had been there you would have seen them? A. Yes, sir. Q. After you made the drop you brought your engine north on the main line so that the wheels of the tender were south of the switch point? A. Yes, sir. Q. Do you remember about how far? A. No, sir. Q. They might have been just a foot over or they might have been two or three feet over? A. Yes, sir. Q. Or half a dozen feet over? A. Yes, sir. Q. Or a dozen feet over? A. No, they were not a dozen feet over."

174 Q. Now you made those answers in reply to those questions, didn't you?

A. Yes, sir.

Q. Now when your engine came in a northerly direction to cross over the switch at that time, did you see anyone else standing along the side—in that immediate vicinity?

A. After we made the drop?

Q. On the east side?

A. After we made the drop?

Q. Yes, after you made the drop.

A. Yes, sir; I saw Miller.

Q. Where did you see Miller?

A. I saw him right east of the switch.

Q. I did not mean east. I mean whether north *of* south?

A. I could not exactly tell that now.
Q. You could not?
A. No, sir.
Q. Did you see Pigg there then?
A. Yes, sir; I saw Pigg after we pulled over with the engine above the switch.
Q. Did you see where Pigg was then?
A. He come right in front of the engine after we pulled up there.
Q. Was he south or north of the switch?
A. He was south of the switch.
Q. You tell this jury he was south of the switch?
A. Yes, sir.
Q. And don't know that Miller was right with him south of the switch, and east of the main line track?
A. Yes, sir.
Q. You are positive of that fact, are you not?
A. Yes, sir.
175 Q. And they were about how many feet south of that switch?
A. I could not exactly tell that now.
Q. Four, five or six feet south of the switch, anyway?
A. Yes, sir.
Q. And they were standing close together, weren't they?
A. Yes, sir.
Q. And apparently they were talking together?
A. They were.
Q. Now north of them quite a distance, was Ralph Moore, wasn't he?
A. Yes, sir; a couple of feet.
Q. A couple of feet?
A. Yes, sir.
Q. Why, he was north of the switch after he turned it right then?
A. Yes, sir.
Q. And he stood north of the switch at the time he turned it, didn't he?
A. Yes, sir.
Q. And now you tell this jury that he was north of the switch at the time he turned it, and that Pigg and Miller were south of the switch at least four or five feet, standing there together? That is right, is it?
A. Yes, sir.
Q. Now then, you claim, you stated, did you, Mr. Temps, that after he had turned the switch, Ralph Moore then got on the foot hold, the foot stirrup—what do you call that? Is it a stirrup?
A. A stirrup.
Q. On the east?
A. On the east side.
Q. And end of the tender?
A. Yes, sir.

Q. That is correct, isn't it?
A. Yes, sir.
176 Q. Now when he got on at that time Pigg and this man Miller were still south of the switch, and still talking, weren't they?
A. Yes, sir.
Q. Did you notice how far he rode on the tender there then?
A. He rode on the tender just about to the——
Q. How many feet?
A. I could not tell.
Q. About how many?
A. About twenty feet.
Q. About twenty feet in your best judgment?
A. Yes, sir.
Q. And then you say he got off, did he?
A. Yes, sir.
Q. And after he got off he then went back of the tender?
A. Yes, sir.
Q. You say that just before he got off he took hold of this—the handle of the pin-lifting rod, which turns the coupler?
A. Yes, sir.
Q. That is correct, is it not?
A. Yes, sir.
Q. The correct name of that is the pin-lifting rod, isn't it?
A. Yes, sir.
Q. That is what it is designated?
A. Yes, sir.
Q. Sir?
A. Yes, sir.
Q. Now then, when he took hold of that pin-lifting rod, whether it worked or not, you don't know?
A. I don't.
Q. And you don't know whether the coupler or coupling uncoupled, do you, at that time?
A. No, sir.
177 Q. You stated that then you saw him get down off of the engine and go back behind the tender?
A. Yes, sir.
Q. What he did there you don't know?
A. No, sir.
Q. What took place you don't know?
A. No, sir.
Q. But you say that you are positive that the engine was moving at that time at the rate of four or five miles an hour, and that he run a distance of at least twenty feet, and that the last you saw of Miller and Pigg that they were south of the switch talking together?
A. At that time.
Q. Were you watching these men up here?
A. Yes, sir.
Q. He was north?

A. Yes, sir.
Q. They were south?
A. Yes, sir.
Q. Now you could not be looking in both directions, could you?
A. The engine——
Q. (Interrupting.) You were more intent, were you not, on watching Moore?
A. Yes, sir.
Q. Isn't that a fact?
A. Yes, sir.

Mr. Brown: Let him answer the question.
The Court: If you have any further answer, answer it. The question was, "You could not be looking in both directions at once, could you?"
A. No, sir.
Q. In other words, Pigg and Miller were south of you, your engine was moving north, and Moore was north?
A. Yes, sir.
178 Q. And you were intent upon watching Moore, weren't you?
A. Yes, sir.

The Court: If there are any witnesses in the room that expect to testify in this Moore case, let them make it known. Anybody in the room that expects to be a witness in this case on trial? All right.

Q. Mr. Temps, I will ask you whether or not these answers were made by you in response to the following questions: "Q. How far did he ride on the side of the tender? A. About twenty feet. Q. Then what did he do? A. He pulled the lever, and then got off. Q. While he was riding twenty feet he pulled the lever and then got off and ran? A. When he pulled the lever he got off and ran around. Q. Mr. Miller and Mr. Pigg were still talking? A. I don't remember. Q. He was still standing on the ladder when he pulled the lever? A. Yes, sir. Q. What is the next thing that occurred after he got off? How far north of the switch stand was he then? A. About forty or fifty feet. Q. You made that answer to that question? A. Yes, sir. Q. Mr. Miller and Mr. Pigg were still standing south of the switch stand? A. Yes, sir."
Q. You made that answer, didn't you, a year ago, and that was correct then, wasn't it?
A. Yes, sir.
179 Q. Is it correct?
A. Yes, sir.
"Q. Mr. Miller and Mr. Pigg were still standing south of the switch stand?
"A. Yes, sir.
"Q. They were south of the switch stand?
"A. No, they were walking up north toward the cars.
"Q. Had they taken many steps?

"A. No, not very many. About thirty or forty feet.
"Q. They were about even with you at the time he got off the ladder at the side of the engine and you were about even with the switch point?
"A. About five feet past the switch point and about twenty feet from the switch point from the hind end of the tender.
"Q. And they were just about even with you?
"A. Yes, sir.
"Q. And just about even with the switch stand?
"A. Past about five feet north.
"Q. They had moved from the point four feet south of the switch stand to a point five feet north of the switch stand?
"A. Yes, sir.
"Q. What is the next thing that attracted your attention?
"A. Pigg hollered and flagged.
"Q. What did he say?
"A. He hollered and said we caught Ralph Moore."
Q. You remember that distinctly, don't you?
A. Yes, sir.
Q. Now at the time Pigg and Miller were standing together, weren't they side by side?
A. Yes, sir.
"Q. They were standing side by side?
"A. Yes, sir.
180 "Q. You had passed north of them so that they were south?
"A. They were just straight east of me when they hollered.
"Q. They were not any north of you when they hollered?
"A. No.
"Q. How far did the train run before the stop?
"A. About thirty feet.
"Q. Did Ralph talk to either Pigg or Miller while he was standing at the switch?
"A. No, sir."
Q. And you never heard Miller talk to Moore, did you?
A. No, sir.
Q. And you never heard Miller give him any orders or speak to him anything about a carload of frogs, did you?
A. No, sir.
Q. And you never saw any carload of frogs in the yard, did you?
A. I did not.
"Q. Are you positive?
"A. No, sir.
"Q. Did either of them talk to him while he was standing at the switch?
"A. No, sir.
"Q. Where were Miller and Pigg when the engine stopped?
"A. They were 'round on the other side.
"Q. Did they go to the west side of the track south of the engine?
"A. They ran ahead of the engine; south of the engine.
"Q. The engine was headed south?

"A. Yes, sir.
"Q. Did you or Hawkins get down out of the engine?
"A. I got down on the ground and looked at him and when I seen him I got back in the cab."

181 Q. You made that answer, didn't you?
A. Yes, sir.

"Q. What did you see when you saw him?
"A. I saw him right under the hind driver brake beam.
"Q. Right under the brake beam of the hind driver?
"A. Yes, sir.
"Q. In what position was his body lying?
"A. I couldn't tell you that, but he had his head against the rail.
"Q. Which rail?
"A. The rail of the main line.
"Q. On the main line or the track joint?
"A. On the cut-off track.
"Q. He had his head against the west rail of the cut-off track?
"A. Yes, sir.
"Q. How was his body?
"A. Across the track.
"Q. Across the east track of the main line?
"A. His body was lying over the passing track."

Q. You made those answers to those questions, did you?
A. Yes, sir.
Q. You had only worked with him about a week, I think you said?
A. Yes, sir.
Q. And when you got down and looked and saw the boy lying under the wheels, you ran back and got in the cab?
A. Yes, sir.
Q. And Hawkins, the engineer, did not get down out of the cab?
A. No, sir.
Q. And you men never looked at the boy as he lay there, or took any part in it after that?
A. What is that?

182 Q. I say you or Hawkins, the engineer, did not get down, or take any part in helping get the boy out, did you?
A. No, sir.

Witness dismissed.

NORMAN HAWKINS, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?
A. Norman Hawkins.

182½ Q. Mr. Hawkins, were you the engineer in charge of the engine at Marysville, Kansas, at the time that Mr. Moore was injured?
A. Yes, sir.

Q. That is, that backed against him or ran over him?
A. Yes, sir.
Q. Where did you get that engine on that trip, that is, where you had picked it up?
A. At Hanover.
Q. At Hanover, Kansas?
A. Yes, sir.
Q. And when did you get the engine at Hanover?
A. In the morning.
Q. In the morning of that day?
A. Yes, sir.
Q. That same day?
A. Yes, sir; that same day.
Q. And was the tender that was to it at the time of the accident attached to it when you got it?
A. Yes, sir.
Q. The same tender?
A. Yes, sir.
Q. Do you know who had been in charge of that engine before you got it?
A. Yes, sir.
Q. Who?
A. I.
Q. I mean before you got it on that trip? You say you had been in charge of it before that?
A. Yes, sir; I took the engine into Hanover.
Q. I mean, where did you get ahold of the engine, first get hold of it, when you were operating it when it was out that time——
A. Down at the round house.
183 Q. Where?
A. At the round house at Hanover.
Q. I am not speaking of the day of the accident, Mr. Hawkins. How long had that engine been out of St. Joseph?
A. Oh, about—well, she come out Tuesday.
Q. She came out Tuesday?
A. Yes, sir.
Q. And who was in charge of it at that time?
A. Richards.
Q. And where did you get charge of the engine?
A. At Hiawatha, Kansas.
Q. On what day did you get it?
A. Monday.
Q. On Monday at what time?
A. About six o'clock.
Q. Was Mr. Moore in your crew at that time?
A. Yes, sir.
Q. On Monday?
A. Yes, sir.
Q. And where did you go with the engine, how far west?
A. Hanover.
Q. And then turned and came back?

A. Yes, sir.
Q. Did you have the same crew with you all the time?
A. Yes, sir.
Q. From Hiawatha, I mean?
A. Yes, sir.
Q. And who were the other members of the crew, aside from Mr. Moore?
A. Conductor Pigg, Brakeman Shepard and Brakeman Coy and Fireman Temps.

Q. You understand the map or chart laying upon the floor
184 here, do you, Mr. Hawkins? The marks running north and south are supposed to represent the railroad tracks of the Grand Island Company at Marysville; the place that I indicate here with the pointer is supposed to represent the switch stand at which Moore stood?
A. Yes, sir.
Q. Just shortly before he was injured and which he was operating. With that explanation, do you understand the situation there, Mr. Hawkins?
A. Yes, sir.
Q. I believe the tracks running through Marysville run practically north and south, at least at the point where the accident occurred, is that right, Mr. Hawkins?
A. Yes, sir.
Q. And from there on north, and then again turn to the west?
A. Yes, sir.
Q. Or northwest?
A. Yes, sir.
Q. Mr. Hawkins, what had you been doing with the engine in Marysville that day, that is, just shortly before the accident occurred?
A. Well, we went in on the house track and was switching.
Q. Had you passed over the point, the switch point where Mr. Moore stood previous to the time he was injured?
A. Yes, sir.
Q. What had you passed over there for, what had you been doing?
A. Well, we went both ways over there.
Q. In other words, I believe you had pushed two cars down ahead of you, and then set them back down here, dropped them back down on the side track or passing track somewhere, and then had gone back south again over the switch point, and then backed up again at the time Moore was injured?

185 A. We made a drop of some cars, but how many, I don't know.
Q. You dropped some cars?
A. Yes, sir.
Q. And after that was done you passed back south over the switch point, had you?
A. Yes, sir.

Q. Now do you know how far you passed over that switch point in order to allow Mr. Moore to throw the switch for you?
A. No, sir.
Q. You don't know how far you passed over?
A. No, sir.
Q. Have you any recollection on that subject whatever?
A. No, sir.
Q. In any event you passed far enough to permit the switch to be thrown, did you?
A. Yes, sir.
Q. How long did you remain stationary there at that time before you backed up again?
A. I don't know.
Q. You don't know about that?
A. No, sir.
Q. Now how did you happen to back, that is, upon what signal or under what circumstances did you back?
A. By the fireman.
Q. What did he do?
A. He told me to back up.
Q. And on what side of the engine did the fireman stand?
A. On the left side.
Q. On the left side?
A. Yes, sir.
Q. And what were his duties with respect to watching out for a signal that Moore might give and transmitting it to you?
A. Well, that was his duties.
186 Q. That was his duty?
A. Yes, sir.
Q. In other words, you stood upon the right hand side of the engine, did you, to operate your engine?
A. Yes, sir.
Q. After getting the signal from the fireman to back up, what did you do?
A. I backed up.
Q. And what next attracted your attention, Mr. Hawkins?
A. Somebody hollering.
Q. And had you any idea how far you had gone before you heard this noise?
A. No, sir.
Q. When you heard this noise and they hollered to you what did you do?
A. The fireman says "Hold her," and they were all hollering out there, and I applied the brakes.
Q. Could you estimate how far it ran after you applied the brakes?
A. No, I could not.
Q. What kind of brakes did you have?
A. Straight air and automatic, both.
Q. Straight air and automatic, both?
A. Yes, sir.
Q. What did you apply?

A. The straight air.
Q. The straight air?
A. Yes.
Q. And tell the jury what effect that has—which stops it quicker?
A. The straight air stops the quickest.
Q. After your engine stopped, what did you observe at that time,—did you get out?
A. No, sir.
Q. What did you observe or ascertain had happened at that time?
A. Why, the conductor told me that we had Moore under the engine.
187 Q. Did you have to move the engine any before he was taken out?
A. Yes, sir.
Q. Which way did you move it?
A. We moved it south.
Q. Moved it south?
A. Yes, sir.
Q. Did you get out to help move Mr. Moore away or do anything with him?
A. No, sir.
Q. Why didn't you?
A. Because I had to stay on the engine.
Q. What did you do with the engine after he was taken out?
A. What did I do with her?
Q. Yes, sir.
A. Why, she stood there.
Q. The engine stood there how long?
A. I don't know.
Q. And you remained with it, did you?
A. No; after they took Moore out I got down off the engine then.
Q. That is what I mean, after they took him out, from under the engine, what did you then do?
A. Why, I got down then.
Q. Did you go to the house with Moore?
A. No, sir.
Q. You did not go with him?
A. No, sir.
Q. Now what was done with that engine, Mr. Hawkins, after Mr. Moore was taken to this house? What did you do with the engine there? I mean, did you leave it there or bring it to St. Joseph or what was done with it?
A. Oh, the engine came to St. Joseph.
188 Q. How soon after the accident did you start to St. Joseph with the engine?
A. Well, if my recollection is right, we left there at 11:15.
Q. And about what time did the accident occur?
A. 9:25.
Q. Did you bring Mr. Moore to St. Joseph on your train with your engine?
A. Yes, sir.

Q. Tell the jury whether or not there was anything done, any repairs made to the coupling apparatus upon the rear end of the tender while the train was at Marysville or in that vicinity there?
A. There was not.
Q. What was done with the engine when it came to St. Joseph? Was any inspection made of it at that time?
A. Yes, sir.
Q. How soon after it got into St. Joseph, Mr. Hawkins?
A. Why, right away, as soon as that engine stopped on the clinker pit.
Q. As soon as it stopped on the clinker pit?
A. Yes, sir.
Q. And who inspected the engine at that time, if you know?
A. Why, I don't know. There was a camera down there and four or five men. I know them. I saw them.
Q. Were you present when they tested the coupler there at the time, did you observe that?
A. No, I did not observe that.
Q. You did not notice what they were doing? During the time that you have been out on this trip with this engine, starting, as you, say, Monday, I believe, tell the jury whether or not the brakemen in charge of your train or anyone else had coupled and
189 uncoupled cars from the tender, during that period of time?
A. Yes, sir.
Q. And state how frequently that was done?
A. Why, I could not state how many times it was done, quite frequently.
Q. I wish you would tell the jury if you knew of anything being wrong with the coupler upon that engine or tender at any time?
A. There was nothing wrong.
Q. Tell the jury how the men operated it when coupling and uncoupling, whether from the side or going in between?
A. They uncoupled from the side.
Q. Mr. Hawkins, whose duty was it to ascertain and to report any defects that may be upon your engine or tender?
A. The engineer.
Q. The engineer?
A. Yes, sir.
Q. I will ask you to state whether anyone ever at any time complained to you or suggested to you that there was anything wrong with the coupling device on that tender?
A. No, sir.
Q. And did you ever know of their being anything wrong with it at any time?
A. No, sir.
Q. Who else did you see down there, Mr. Hawkins, immediately after the accident occurred, if anyone?
A. Who else did I see?
Q. Yes, sir; at the place of the accident?
A. Nobody that I know of but Pigg and Miller.
Q. Did you see both Mr. Pigg and Mr. Miller there?

A. Yes, sir.

190 Q. What were they doing?

A. They were the ones that took Moore out from under the engine.

Q. And what did you see them do with him, if anything?

A. I saw them take him out to the side of the track.

Q. How long had you known Mr. Moore prior to the time of this accident?

A. Oh, I could not say for certain.

Q. Well, I mean approximately, during the time that he had been working for the company, had you?

A. Yes, sir.

Q. And during that period of time had he prior to this trip worked upon trains that were hauled by your engine?

Cross-examination by Mr. Mytton:

Q. You say that when the engine was brought here and it was taken down, and they took some pictures, and you were down in the crowd, were you?

A. I did not see them take pictures.

Q. Well, did they?

A. I don't know.

Q. You don't know whether they took any pictures when you were there?

A. No, sir; I don't know; I saw a camera there.

Q. Well, you saw a camera?

A. Yes, sir.

Q. And Charles Conkwright, you know him, don't you?

A. No, sir.

Q. And Ferrell, you know him, don't you?

A. No, sir.

Q. The yard master of the Terminal?

A. Oh, Sam Ferrell?

191 Q. That is not Charley Ferrell, Sam Ferrell?

A. Yes, sir.

Q. You know him, and Charley Conkwright, the Rock Island man, were they there?

A. I don't know Conkwright.

Q. How is that?

A. I don't know Conkwright.

Q. Was Ferrell there?

A. I never noticed him.

Q. Or did you pay any attention to especially who was there at the time this camera was there?

A. No, sir.

Q. Now you were looking back on the right hand side, and the fireman said to back up?

A. Yes, sir.

Q. Did he say any other words?

A. Not that I know.

Q. Not that you know?
A. No, sir.
Q. Now prior to that time the conductor had hollered or did you hear him holler?
A. Who?
Q. The conductor? The conductor?
A. I don't know whether the conductor hollered.
Q. You don't?
A. No, sir.
Q. Well, did you hear him make any remark? Did you hear Pigg say anything?
A. I heard Pigg say "You have Moore under the engine."
Q. You heard him say that?
A. Yes, sir.
Q. When he said that, Pigg was south and was ready to pass the pilot of your engine, wasn't he?
A. Pigg was already past the pilot of my engine.
192 Q. And was over on the west then at that time of the track?
A. West?
Q. Yes?
A. Why, no.
Q. Where was he?
A. Well, I am running east and west out of there.
Q. Well, let me help you, Mr. Hawkins. Mr. Hawkins, this is north and south, and that is east and west, and if you will refresh your memory, the tracks at that particular point—this map is supposed to represent them. (Indicating.)
A. If you will give me the west and east side of that track, and I will tell you where he was.
Q. That is the west track? (Indicating.)
9. All right, sir.
Q. Pigg went over on this side, on the west side, didn't he?
A. Yes, sir.
Q. And when he got over here, that was when he hollered and said you got Moore under the engine?
A. Yes, sir.
Q. What was the first thing you heard Pigg say?
A. That was the first thing I heard Pigg say.
Q. As a matter of fact you don't really know where he was standing at that time, when he yelled that out, do you?
A. When he yelled that out?
Q. Yes, sir.
A. When Moore was under the engine?
Q. Do you know where Pigg was when he yelled that way, where was he standing when he hollered?
A. What?
Q. Where was Pigg standing when he hollered and said you have got Moore under the engine?
193 A. Why, he was right there on the west side of the engine.
Q. He was on the west side?

A. Yes, sir.
Q. And he had come from the south apparently?
A. Yes, south.
Q. Now your fireman stayed right on the engine?
A. That is to my knowledge.
Q. And neither one of you got off?
A. I didn't.
Q. This was a freight engine?
A. Yes, sir.
Q. Now the only function of a steam hose is to heat cars for passenger service?
A. Oh, no. They heat freight on express cars with them, that have got horses in them.
Q. They do?
A. Yes, sir.
Q. You testified in this case before, didn't you?
A. I believe you remember it, do you not?
Q. Yes, sir; I remember it; and wasn't this question asked you, Mr. Hawkins?

The Court: In reading from the deposition, make it clear what are the questions and what are the answers, and what is from the deposition, and what is the original question.

Mr. Mytton: Yes, sir; I will do that. In your deposition taken in our office, Mr. Hawkins, I will ask you if this question was asked you:

"Q. She was a freight or passenger engine?
"A. She was a freight engine."
A. I expect she was.
194 "Q. And what equipment had she placed on her on the back end of the engine, I mean what equipment was there in the way of steam hose?
"A. Why, she had an air hose, signal hose and steam heating hose.
"Q. A steam heating hose is a hose used on passenger engines to heat the cars with, is it not?
"A. It is used on any engine to heat cars with.
"Q. You don't use them on freight cars to heat cars for horses and mules, do you?
"A. No, sir.
"Q. Then you use them on passenger trains?
"A. Yes, sir.
"Q. And you don't use a steam hose except to heat cars for passenger service?
"A. No, sir.
"Q. It has no further functions to perform, is that correct?
"A. Not that I know of."
Q. Now those questions and those answers were made by you, weren't they in your deposition, or what is your memory about that?
A. I guess they must be, if my memory is right.
Q. And they were true, weren't they, when you made them?
A. To the best of my knowledge.

Q. Now I will ask you if these questions and answers were made by you please:

"Q. Do you know that you as engineer or your fireman, had the right to move that engine?

"A. Oh, no.

"Q. And when Moore was turning the switch, whose duty was it to control the movement of that engine?

"A. Why, Moore, if he wanted the engine to back up.

195 "Q. Did anybody else have the right or was it anybody else's duty to give a signal or to cause that engine to move without a signal from Moore or without notifying Moore of the intention to move the engine?

"A. Why, the conductor has charge of the train, he can do anything.

"Q. You don't know who the fireman got the signal from?

"A. No, sir.

"Q. He told you whom he got it from?

"A. No, sir.

"Q. He didn't at the time, he has since told you whom he got it from?

"A. Not to my knowledge.

"Q. You don't remember him telling you that?

"A. No, sir."

Q. And if that is so, you have never heard who give the signal to the fireman, have you? I mean, the fireman never told you?

A. No.

Q. So far as you know this fireman might have got that signal from Pigg, just as well as Moore, because Pigg had charge of the whole train?

A. Pigg was in charge of the train.

Q. To refresh you- memory, don't you remember that you moved the engine up to the depot after the accident happened?

A. I don't know.

Q. You don't remember?

A. No, sir.

Q. Do you remember who carried the board up there, or who got the board, how the board got up there?

A. No, I don't.

Q. Don't you remember that you took your engine up to the depot to get that board?

A. Well, I would not say positively. We might have went up there.

196 Q. You were pretty well excited at that time?

A. I guess I was.

Redirect examination by Mr. Brown:

Q. At the time that you heard Mr. Pigg call to you and say that you had Moore under the engine, you say he was then standing on the west side of your engine?

A. Yes.

Q. Had you seen him come around there?

A. Yes, sir; he come around from the pilot.
Q. He come around the pilot?
A. Yes, sir.
Q. And tell the jury whether your engine was standing still then?
A. Why, the engine was standing still.
Q. That was after you had caught the man under the engine?
A. That was after we had caught the man under the engine.
Q. And what Mr. Pigg or Mr. Moore may have said at the time the man was caught, you don't know anything about?
A. I don't know nothing about it.
Q. Do you know whether or not this engine that you were using, and in fact all of the engines that are used on the Grand Island, were used interchangeably for freight and passenger service?
A. Yes, sir; they are.
Q. Used either for freight or passenger?
A. Freight or passenger.
Q. Tell the jury whether all the engines are so equipped that you can use them either for the freight or a passenger engine?
A. Yes, sir, they are.
197 Q. And I wish you would tell the jury whether or not, that is, if you know, whether or not that is customary on roads of the size of the St. Joseph and Grand Island to have their engines all equipped to use either as passenger or freight?
A. Why, it is.
Q. And in equipping them to use them as a freight or passenger train, tell the jury whether or not it is necessary to have them, and whether they do have a steam hose like the one that was on this tender, upon their engines?
A. They do have a steam heat hose.

Witness dismissed.

E. O. WEBER, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please.
A. E. O. Weber.
Q. Where do you live, Mr. Weber?
A. Marysville, Kansas.
Q. What is your business?
A. Lumber man.
Q. How long have you lived in Marysville, Kansas?
A. A little over sixteen years.
Q. Mr. Weber, were you in Marysville, the day that Mr. Ralph Moore was injured?
A. Yes, sir.
Q. Did you go down to the scene of the accident soon after it occurred?
A. Yes, sir.
Q. About how soon after the accident occurred, or how long was it before you went down?

A. I suppose about six hours.

198 Q. That was on the afternoon of that day, was it?

A. Yes, sir; I think so.

Q. In company with whom did you go there?

A. Why, Mr. Guthrie, Mr. Thompson, and Mr. Eddington, and Mr. Lonergan.

Q. Was Mr. Hartigan there at that time?

A. Yes, sir; he was there when we got there, I think.

Q. Do you know where the switchboard is located that Mr. Moore was supposed to have thrown just before he was injured?

A. Yes, sir.

Q. We will suppose that the tracks,—the black lines there are the railroad tracks running north and south through the town of Marysville, Mr. Weber, and that the point indicated by the ruler here or the pointer is the switch stand that Mr. Moore was supposed to have been operating just before he was injured (indicating on plat)?

A. Yes, sir.

Q. And that the lines running across here are the cross-over or cut-off tracks running across. Now did you make an inspection of the ground there you say that afternoon?

A. Yes, sir.

Q. And what did you observe, Mr. Weber? What did you find there, if anything? I mean with respect to indications of the accident, blood on the rail or anything of the kind?

A. Why, I think so, yes, sir; very little. Of course, it was the first time I ever looked at anything of that kind, and we all looked there, and were satisfied that we saw indications of that sort.

Q. Did you make any measurements there?

A. Why, I helped to, yes, sir.

Q. How far was it from the switch stand to the first indication of blood upon the rail?

199 A. Well, now I would like to say, that I refreshed my memory by reading that document that I signed.

Q. Well, that is all right.

A. My recollection is 46 feet.

Q. 46 feet from the switch stand to the point where you first saw blood?

A. About that, yes, sir.

Q. Did you notice any indications on the surface of the ground there?

A. No, sir.

Q. You did not notice anything of that kind?

A. No, sir.

Q. But the first blood that you discovered in the afternoon at the time you made the investigation was some 46 feet west?

A. About 46, yes, sir.

Q. What is the nature of the ground there, Mr. Weber?

A. It is level.

Q. Level ground?

A. Yes, sir.

Q. And what was the character of the ground, I mean, was it rock or cinders or sand, or what was it?

A. Well, that track has all been filled in with gravel in the last eight or ten years and some cinders and gravel mixed.

Cross-examination by Mr. Parkinson:

Q. Mr. Weber, I don't believe I met you, did I?

A. No, you did not. I don't think I was called down there when you took those depositions.

Q. Did I come out to your house and ask you about it?

A. No, I think not.

Q. I don't recollect it if I did. Mr. Thompson was there?

A. Yes, sir, and Mr. Guthrie.

200 Q. And Mr. Lonergan?

A. Yes, sir. You mean at the time we made that examination?

Q. Yes, sir.

A. Yes, sir.

Q. Was anyone else there?

A. Mr. Eddington, the photographer.

Q. Anyone else standing there or near there?

A. I don't recollect anybody else.

Q. Mr. Lonergan, the agent, is he in the city now?

A. Yes, sir.

Q. Could you give me the distance from the switch points—that is, to the joinder of the frog here?

A. Well, we made a measurement. It is my recollection that we made a measurement from the switch stand, I think that is what they called it to where they took Mr. Moore out; that was about 70 feet.

Q. About 70 feet?

A. Yes, sir.

Q. They took him about between these two rails here? (Indicating.)

A. I think so. Of course, now, I don't know that.

Q. You were not there?

A. No, sir.

Q. You think it is about 70 feet from the switch stand where they took him out?

A. No, sir.

Q. Now you just casually noticed the ground around there, you did not examine it critically?

A. We examined it critically because we were asked that.

Q. Where did you find the first pool of blood?

A. Well, I think that was about as I said, 46 feet.

Q. From here? (Indicating.)

A. From the switch stand.

201 Q. And it was in the center of the track?

A. Well, I don't know as to that.

Q. You don't know whereabouts in the track it was?

A. I would not say, no, sir.

Q. You did not find any blood except—you did not find any blood anywhere on the rail, did you?

A. I don't think we did; no, sir.

Q. You found no blood at any place where his hands had been cut off, at any place along there along the rail, where it had cut it off, you did not see any blood at that point?

A. I don't recollect it.

Q. But out in the center of the track you saw a pool of blood somewhere?

A. Very little, a very small pool, if any. It was scattered along the rail as I recollect it.

Q. Well, you don't remember along which rail, or whereabouts it started or how far it extended?

A. No, I would not say that.

Q. What I am trying to get at, you are not able to tell this jury at this time where either one of his hands were cut off?

A. No, sir; I would not pretend to.

Q. Because you could not from an inspection tell where that occurred there?

A. No, I don't think I could.

Q. And you don't mean to tell this jury that this pool of blood was made by cutting off one hand or the other hand do you or either one of them?

A. I could not say that at all.

Q. You could not say that at all?

A. No, sir.

202 Q. Or whether that came from the blood from his leg, you don't know anything about that at all?

A. No, sir.

Q. So you cannot enlighten the jury anything about the question of where his hands were cut off, or where his leg was crushed from inspection?

A. No, sir.

R. C. GUTHRIE, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

202½ Direct examination by Mr. Brown:

Q. State your name, please.

A. R. C. Guthrie.

Q. Where do you live, Mr. Guthrie?

A. Marysville.

Q. What is your business?

A. I am an undertaker.

Q. How long have you lived in Marysville?

A. About four years anyhow.

Q. Were you in Marysville at the time Mr. Moore was injured there?

A. Yes, sir.

Q. Did you go down to the scene of the accident that day?

A. I was down that evening.

Q. About what time?
A. Well, I should guess about between three and four.
Q. Who was with you at that time, if anyone?
A. Mr. Weber and Mr. Thompson and Mr. Lonergan and Mr. Eddington and Mr. Hartigan.
Q. Did you make some measurements down there that afternoon?
A. Yes, sir.
Q. Do you remember where the switch stand stood, the one that Mr. Moore was supposed to have been operating just before he was injured? I mean, do you have in mind where it stands there?
A. Yes, sir.
Q. Now looking north from that switch stand—this is supposed to be the switch stand here, and the tracks running north from that—looking north from that, did you make any investigation so as to see whether you could find any evidences of the injury or marks of blood or anything of that kind?
A. We did.
203 Q. And did you find any blood marks or blood stains, and if so, how far from the switch stand was the nearest that you found?
A. Well, we found evidences of the marks there, but as to the distance from the switch stand I could not remember that now, because they were all measured, and Mr. Hartigan put those down on a paper, and we signed the paper, and I left it slip from my mind, did not pay any attention to it.
Q. You have not seen the memoranda you made at that time since the time of the accident?
A. I have not seen it since.
Q. Did you bear in mind about how far it was, or have you any recollection on that subject?
A. Well, I would not attempt to guess at it now, because I have not thought anything of it since then.
Q. What was the nature of the ground there?
A. The ground was all smooth, cinder track.
Q. Well, I believe that is all, if you don't remember the measurements.

Cross-examination by Mr. Parkinson:

Q. Mr. Lonergan was the station agent of the Grand Island Railway Company there at that time?
A. Yes, sir.
Q. And he is today?
A. Yes, sir.
Q. And he is here in the city today, is he not?
A. Yes, sir.
Q. And he was there at that time, was he not?
A. Yes, sir.
Q. Did Mr. Lonergan tell you gentlemen there at that time where the hand of this man had been found?
204 A. Yes, sir; he did.
Q. Where did he show you where the hand had been found?

A. I don't remember now where it was.
Q. You don't remember where it was?
A. No, sir.
Q. Did he tell you where the hand had been delivered to him, where it had been brought to him?
A. I don't remember of him saying that the hand was brought to him.
205 Q. You don't remember that? Did he tell you at that time that Mr. Baughman found the hand and delivered it to him?
A. No, sir.
Q. He did not tell you that?
A. No, sir.
Q. At Mr. Roseberry's house?
A. I don't remember that he said that.
Q. Made no statement of that kind to you gentlemen there?
A. Not that I remember.
Q. Mr. Lonergan who is here is the same Lonergan that was out there at that time?
A. Yes, sir.
Q. Was Mr. Baughman there about when you were taking these measurements?
A. I did not see him at all.
Q. You don't remember of seeing him at all?
A. No, sir.
Q. It was in the afternoon when you were there?
A. Yes, sir.
Q. You don't remember whether it was that day or the next day except from the memoranda, do you?
A. No, sir.
Q. You were not there in the morning when Mr. Baughman found the glove?
A. No, sir.

Witness dismissed.

WILLIAM LONERGAN, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please.
A. William Lonergan.
206 Q. Where do you live, Mr. Lonergan?
A. Marysville, Kansas.
Q. How long have you lived there?
A. I have lived there since May, 1872.
Q. And what is your business?
A. My business is agent of the St. Joseph and Grand Island and Union Pacific Railroad; also agent of both express companies.
Q. Do both roads run through Marysville at that point?
A. They do, yes, sir.

Q. You say you acted as agent for the two at that point?
A. Yes, sir.
Q. And how long have you been acting for the St. Joseph and Grand Island?
A. You mean as agent?
Q. Yes, sir; as agent?
A. Since the 22nd day of September, 1899.
Q. And how long have you been employed by that company?
A. Since the 2nd day of March, 1886.
Q. Were you in Marysville the day Mr. Moore was injured?
A. I was.
Q. Did you witness the accident?
A. I did not.
Q. How soon after the accident were you upon the scene?
A. Just as soon as the conductor notified me that they had had an accident.
Q. You went immediately up to the scene of the accident?
A. Just as soon as he told me, after I had phoned for the company's doctor; yes, sir.
Q. What did you see when you got up there, where was Mr. Moore?
A. Mr. Moore was laying on the west side of the Grand Island main line.
207 Q. On the west side?
A. On the west side of the Grand Island main line; yes, sir.
Q. And about how far north of the switch stand, if you know?
A. About seventy feet.
Q. Laying about seventy feet north?
A. Yes, sir.
Q. Of the switch stand?
A. Yes, sir.
Q. Did you make any measurements that day at the place?
A. I did not only just—I did in the afternoon, yes, sir.
Q. I mean, in the afternoon?
A. Yes, sir.
Q. And up to the place where you found him laying you say it was about——
A. (Interrupting.) About seventy feet.
Q. About seventy feet?
A. Yes, sir.
Q. Did you see any evidences there the morning that you were there as to where the accident had occurred, or where he was first caught or anything of the kind?
A. I noticed blood on the flange of the rail, just this side of the frog, and there were some evidences——
Q. Which frog do you refer to, could you point it out there?
A. I refer to the frog.
Q. Which frog now, do you mean? Stand over on this side, Mr. Lonergan, so that the jury can see where you point?
A. This is the frog right here. (Indicating on plat on floor.)

The blood mark was on this rail, right there, on the main line rail. (Indicating.)

Mr. Parkinson: Has he designated that?

208 A. On the main line.

Mr. Parkinson: On the east main line rail?

A. Yes, sir. The blood mark was on the west side of the main line rail.

Mr. Parkinson: And how far south of the joinder of the frogs?

A. Well, I would judge—well, I could not say whether it was three feet or whether it was less than three, but in the neighborhood of three feet.

Q. Now did you see blood anywhere else? Just take the stand, Mr. Lonergan. Did you see blood anywhere else upon the rail or upon the ground?

A. There might have been little splashes, yes, but I don't remember just exactly.

Q. Well, now I mean were they south of that or north of that, the blood that you saw on the rail?

A. I don't distinctly remember of seeing any spots this side or that one.

Q. Have you any definite recollection on the subject at this time, Mr. Lonergan?

A. No, I could not say that I have.

Q. And with respect to the spot of blood that you saw upon the rail, where was Mr. Moore laying when you got down there? I mean, was he south or north of that or west of it or east of it?

A. He was west of it lying in that little vacant spot.

Q. Did I understand you to say that Mr. Moore was laying just west of the blood spot that you saw on the rail?

A. Yes, sir; just west about where the pointer is now.

Q. Just laying west of it?

A. Yes, sir.

209 Q. Did you see either of his hands there anywhere or see either of them picked up or anything of the kind?

A. I saw his hand laying there by the side of the track; yes, sir.

Q. Now where was the hand laying, if you know, the hand that you saw?

A. Well, it was this side of where the blood mark was on the rail.

Q. And about how far from the switch stand?

A. About how far from the switch stand?

Q. How far from the switch stand? How far north or south of the switch stand was the hand that you saw?

A. Well, I can describe it better by saying how far it was this side of the blood mark.

Q. Well, about how far south of the blood mark was it then that you saw the hand?

A. Well, between eight and ten feet this side.

Q. That would be south of the blood mark?

A. That would be south, yes, sir; towards me.

Q. That would be the point where you saw the hand laying?

A. Yes, sir.

Q. And where was the hand laying, that is on the rail or on the side of the rail, or where was it laying?

A. It was laying in the main line between the west main line rail and the east side track rail.

Q. Between the west main line rail?

A. Yes, sir.

Q. And that track, or this one over here? (Indicating.)

A. Yes, sir; that track right about where the point is.

Q. That would be the west, between the west main line rail
210 and the west rail of the cut-over track, would it not?

A. That is right; excuse me.

Q. According to what you state?

A. Yes, sir.

Q. Who was there when you got there, Mr. Lonergan?

A. The conductor, Pigg, Section Foreman Miller, Engineer Hawkins, Fireman Temps,—I would not state positively if Mr. Baughman—George or Sam Baughman.

Q. Did you see Mr. Baughman do anything with the hand, pick it up, any hand, or anything?

A. I did not see him pick it up. I was at Roseberry's house, at the house where we took him, when he brought it down.

Q. Do you know where he got it?

A. I don't know.

Q. Did you see it after you saw it on the railroad track until you saw it in the house at any other place?

Mr. Parkinson: We object to his suggesting and leading the witness, that the hand that he saw on the rail was the hand that was brought over to the house.

Mr. Brown: Well, any hand. Did you see any hand at any other place except the one you saw on the railroad track, and the one you saw at the house?

A. There was one hand that had not been clean cut off.

Q. I mean any hand that was cut off?

A. Yes, sir; that was the only hand that I saw. I saw it there in the track, and then I saw it again at Roseberry's.

Q. At Roseberry's house?

A. Yes, sir; at Roseberry's house.

211 Q. Was that after Mr. Moore had been taken there?

A. Yes, sir.

Cross-examination by Mr. Parkinson:

Q. Now, Mr. Lonergan, I just want to see if we can help the jury a little about these distances. Can you tell us the distance from the switch point here to the joinder of this frog?

A. Well, it is in the neighborhood of fifty feet.

Q. Of fifty feet?

A. Yes, sir.

Q. You think that from this switch point to the joinder of this frog is in the neighborhood——

A. You mean the point of the frog?
Q. I mean the joinder of the frog—yes. You think it is fifty feet?
A. Yes, sir; it is very close to fifty feet.
Q. Isn't it more than fifty feet?
A. Well, I would not hardly think so, no.
Q. So that you think that Mr. Moore was found over on this side of the frog then?
A. No, sir; he was not.
Q. Which side was he found on, the south?
A. Well, the blood there was right about where your finger is now, over on the other rail.
Q. But you told the jury a minute ago that that was seventy feet north of the switch point, and now you say it is only fifty feet to the joinder of the frog, and yet a minute ago you told us that he was found seventy feet north, now which is correct?
A. I beg your pardon. I was asked the question as to where he was laying.
Q. Oh, to where he was laying?
A. Yes, sir.
212 Q. And you said he was lying right opposite to the pool of blood, just west of the pool of blood?
A. A little to the west.
Q. A little to the west of the pool of blood?
A. Yes, sir.
Q. This is west? (Indicating.)
A. Yes, sir.
Q. And that is seventy feet? You think now that the joinder of the frog here was only fifty feet, and he was down in here? (Indicating.)
A. No, sir.
Q. Well, what do you mean then? Explain that to the jury so they will comprehend what you mean?
A. I said that it was about fifty feet from the point of the frog.
Q. To the switch point?
A. To the switch point.
Q. To the joinder of the frog here?
A. To the joinder—well, about that; yes, sir.
Q. And the blood spot was down here about seventy feet?
A. No, sir! it was not.
Q. Was it?
A. No, sir.
Q. Did you say a moment ago that it was seventy feet?
A. I said it was about as near as I can remember.
Q. About seventy feet?
A. Yes, sir.
Q. What do you want the jury to understand now? Was that blood spot seventy feet north of the switch point?
A. I want the jury to understand that the blood spot was south of the frog point, of the point of the frog about four feet.

Q. About four feet? But you say that that joinder of the
213 frog is only about fifty feet north of the switch stand?

A. Yes, sir.

Q. Well, now, if you say from the switch point, the point of the switch to where the blood was found was seventy feet, and it was found south of the frog, how do you reconcile that? How do you explain that to the jury?

A. The blood spot was about four feet south of the point of the frog, about three or four feet.

Q. About three or four feet this side?

A. Yes, sir.

Q. Well, now, you say this was only seventy feet?

A. About fifty feet; yes, sir.

Q. From this switch point?

A. Yes, sir.

Q. And yet from here to here, which is closer to the switch point, is seventy feet? (Indicating.)

A. No, sir.

Q. Well, what do you mean to say then?

A. I mean to say that where he was laying; he was laying practically about opposite—I did not say exactly opposite. I said about opposite.

Q. Now, all right. Now, you want to say that. Just tell the jury was he north or south of the blood spot when he was laying out by the side of the track?

A. Well, he was—just about opposite of the blood.

Q. Just about? The distance between the fifty and the seventy feet you want to take up in about, is that it?

A. Well, I have not got the exact distances.

Q. You are talking about a measurement that you went there that afternoon to make?

A. I was there when the measurements were made.

214 Q. Did you examine the rail? *Did you examine the rail?* You said you examined the rail all along there? Did you examine it north of the frog, north of that fifty feet?

A. Yes, sir.

Q. And this blood spot was within three or four feet of the joinder of the rail?

A. Of the joinder of the frog; yes, sir.

Q. Of the joinder of the frog, which is three or four feet?

A. Yes, sir.

Q. Now, Mr. Lonergan, I want to ask you about this hand and this blood. You were not present when it was found, were you?

A. I was not present when it was found?

Q. No?

A. I saw it there, before.

Q. Now, listen.

A. Yes, sir.

Q. I asked you a question, were you there when it was found?

A. I saw the hand laying there.

Q. Why didn't you pick the hand up and take it over to the house with you?

A. My first duty was to get the man under the shade and into a house, that was my first duty.

Q. You know this, don't you, Mr. Pigg did not pick that hand up and put it on that board that the man was on underneath that tarpaulin, did he? You did not see Mr. Pigg do that, did you?

A. No, sir; I did not.

Q. He did not do it, did he?

A. I don't know whether he did or not.

Q. You could not say who found the hand, could you?

A. I could say who brought it to Mr. Roseberry's house.

215 Q. And that man was Mr. Baughman, wasn't it?

A. Sam Baughman; yes, sir.

Q. Sam Baughman was the man that did it?

A. Yes, sir.

Q. And the same man who testified here yesterday, who you have been down to the St. Charles Hotel with, and you saw him down there?

A. I did not see Sam Baughman testify, sir.

Q. I say, the same man you saw down at the St. Charles Hotel?

A. Yes, sir.

Q. The same Sam Baughman?

A. Yes, sir.

Q. Red mustache man, that is the fellow isn't it?

A. He has a light mustache; yes, sir.

Q. A light, sandy mustache. Now, your deposition was taken, wasn't it?

A. It was.

Q. And in that deposition this question was asked you, and you made this answer:

"Q. Did you examine the place after he was injured?

"A. I did.

"Q. What did you find?

"A. I found his hand in the glove.

"Q. Who found it?

"A. I could not say.

"Q. Who delivered it to you?

"A. Baughman.

"Q. George Baughman, you say."

Q. Is that what you said?

A. That it what I said.

"Q. You were present when it was found?

"A. No. It was brought to Mr. Roseberry's house.

216 "Q. You did not see it found?

"A. No, of course not."

Q. Those questions were asked you and you made those answers, didn't you?

A. I did; yes, sir.

"Q. The fingers were in the glove when it was handed to you?

"A. Yes, sir."

A. Yes, sir.

Q. Now, tell us about this glove? How much of it was gone? What was there? Describe this glove that was handed to you? How much of the fingers and the glove were there?

A. How much of the fingers?

Q. How much of the fingers and the glove of that hand was there when it was handed to you? Don't you remember it, Mr. Lonergan?

A. I think the fingers were all in the glove.

Q. Well, how much of the hand was there?

A. Oh, I could not say, perhaps about like that (indicating).

Q. Just about like that?

A. Yes, sir.

Q. That is right? And it was the left hand, wasn't it?

A. To the best of my recollection; yes, sir.

Q. Now, the only place that you saw any glove was about seventy feet west of the—north of the switch stand, wasn't it, that was the only place you saw any blood?

A. Well, the blood that I saw was on the south side of the frog.

Q. Will you answer the question, Mr. Lonergan. The only glove that you saw was this glove which was seventy feet north of the switch stand?

217 A. The glove that I saw was on the flange of the main line rail, about three feet south of the switch point.

Q. How far north? You don't mean south of the switch point, you mean south of the frog, how far was it?

A. I meant south.

Q. How far north of the switch point?

A. Well, about fifty feet.

Q. About fifty feet?

A. Yes, sir.

Q. Well, you went there for the purpose of making the measurements, and when you were asked about it, and gave your deposition, you made this answer?

"Q. How far along inside of the track did the blood marks extend?

"A. The only marks I remember of was on the rail.

"Q. That was seventy feet north of the switch stand?

"A. Yes."

Q. That was the only one you know about? Did you make those questions and those answers?

A. I did.

"Q. How far did the blood marks extend?

"A. Just at the one place."

Q. Was that answer made?

A. Yes, sir.

"Q. How big a place was it?

"A. Not over a foot."

Q. Did you make that answer?

A. I did.

The Court: Try to make it clear what is deposition, and what is examination—what is questions and what is answers. I say that on account of the stenographer.

218 Mr. Parkinson: I understand, your honor. At this point where the blood was found, there were no marks on the ground or no evidences on the ground, or either glove at that point, was there? Think it over, Mr. Lonergan.

A. The place that I saw the glove and the hand lying was in the main track, west of the passing track rail, west of the west passing track rail, and east of the west main line rail.

Q. Now, so we will see that I asked my question intelligently, at the place where this blood pool was, that you are talking about seventy feet north of the switch-stand or three or four feet south of the frog, was there any evidences of any glove at that point?

A. There was none. It was lying about five, perhaps eight feet south of the switch, at the junction of the switch; the frog, is what I mean.

Q. South is this way (indicating)?

A. Yes.

Q. Now, did you see any evidence of any place where that hand had been cut off, eight or ten feet north of the rail?

A. Not north. Do you mean to ask the question north of the rail? State your question again, please.

Q. North of where the hand was, was there any blood spot on the rail?

A. Just — your question again, please.

Q. Was there any blood spot on the rail where you say you saw this hand?

A. No, sir.

Q. So that there was not anything to indicate that it had been cut off there?

A. Nothing, but the hand laying there.

Q. Nothing, but the hand laying there?

A. Yes, sir.

219 Q. Well, this man had been taken out from under the engine before you got there?

A. He had; yes, sir.

Q. And the engine had gone away, up to the station, to the depot, to get a board or something to take him away, or hadn't it before you got there?

A. Yes, sir; it had.

Q. How?

A. Yes, sir; it had come to the station, and we got a grain door; whether we got it at the station or whether got it up further——

Q. You did not get down there before the grain door?

A. I got there about the same time.

Q. So the engine had gone up to get that and took it back at that time?

A. Yes, sir.

Q. Now, Mr. Baughman was there at that time?

A. Mr. Baughman walked up with me; yes, sir.

Q. He got there when you were there?

A. Yes, sir.

Q. No question about his being there at that time, was there?

A. No, he walked up with me.
Q. You remember it positively?
A. Yes, sir.
Q. This question was asked you and this answer was made:
"Q. Were there any portions of the flesh there or simply blood marks?
"A. Blood marks.
"Q. Any portion of the glove?
"A. Not at that place.
"Q. Did you see any in any other place?
"A. Not except just where the body was lying."
220 Q. Did you make that answer to that question?
A. I did; yes, sir.

Redirect examination by Mr. Brown:

Q. Mr. Lonergan, there is one thing that I did not understand, that I wanted to ask you about. Did Mr. Baughman go down there with you to the scene of the accident?
A. Yes, sir. He joined me right——
Q. Well, he went with you to the scene of the accident, did he?
A. Yes, sir.
Q. And when you got there were there any remarks passed between you and Mr. Baughman about the hand, anything said about the hand?
A. I don't remember whether I told him to bring it or not. I went immediately to the body and helped to get it on the grain door, and helped to get it covered and then went with the body down.
Q. I mean, did Baughman say anything about the hand or go and look at the hand in your presence, or did you go and look at it in his presence?
A. I saw it as I went by, Mr. Brown.
Q. You saw it as you went by?
A. Yes, sir.
Q. Well, did Baughman say anything about it in your presence?
A. Not that I remember of.
Q. Well, that is what I am getting at. Now, when this man, Moore, was put on the grain door, and carried to the house, do you know whether or not Conductor Pigg put the hand on the door, or under some part of the covering on it, or something, and it was carried up that way? Do you know anything about that of your own knowledge?
A. I don't know as it was.
221 Q. Well, do you know anything about it?
A. I know that Mr. Baughman brought the hand into Roseberry's house.
Q. Now, where did you see Baughman with the hand, that is what I am getting at?
A. Just stopped in the dining room.
Q. He came in the dining room where you saw him with the hand?

A. Yes, sir.
Q. Do you know where he got the hand?
A. Well, I don't know.
Q. That is what I am getting at. That is the thing I am trying to get. Do you know where Baughman got it of your own knowledge?
A. I don't know.
Q. You don't know where he got it?
A. No, sir.
Q. Do you know who took it up to the house, do you know anything about that?
A. I don't know who took it to the house. I saw it laying there, and then the next time I saw it, Baughman brought it into the dining room there.
Q. I want it understood. What do you mean by saying that in your deposition that you had not found the hand—that Baughman found the hand, what did you mean by that?
A. I mean that Baughman was the one that brought it to me at the Roseberry house.
Q. The measurements that you made down there that day, did you keep any memorandum of it at all, Mr. Lonergan?
A. I did not.
Q. Kept no memorandum of that?
A. No, sir.
222 Q. The distances that you are speaking of here, is it an estimate on your part or is it actual?
A. It is an estimate.
Q. An estimate on your part?
A. Yes, sir.

Recross-examination by Mr. Parkinson:

Q. Mr. Lonergan, you helped Mr. Pigg carry this body over, didn't you?
A. I don't know who it was carrying it with me.
Q. Well, you went over with it?
A. I did; yes, sir.
Q. And Mr. Pigg went over with it?
A. Yes, sir; he was there.
Q. And he was over there when this hand was brought into you?
A. Well, I guess he was. I don't remember who helped carry it.
Q. Now, so that there will be no misunderstanding, you went down there again in the afternoon with some other men, did you?
A. Yes, sir.
Q. Was Mr. Baughman there then or not?
A. Well, I could not say whether he was or not.
Q. You don't know whether he was or not?
A. No, sir.

Witness dismissed.

CHARLES IRWIN SHEPERD, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please.
A. Charles Irwin Sheperd.
Q. Were you working for the St. Joseph and Grand Island Railway on the date that Mr. Moore was injured, in the town of Marysville?
A. Yes, sir.
Q. Were you one of the brakemen working with Mr. Moore as brakeman in charge of the train and engine and tender around which he was working that day?
A. Yes, sir.
223 Q. Had you worked with this engine and tender prior to the time of the accident around it?
A. Why, I had probably been around it, but not very close
Q. Had you coupled or uncoupled any cars onto that tender during that trip, that week at any time?
A. I don't remember.
Q. You don't know whether you had or not?
A. No, sir.
Q. Do you know whether or not there was anything wrong with the coupling apparatus on the rear of that tender?
A. No, sir.
Q. Did you ever hear or have any suggestion or any intimation to the effect that there was anything wrong with it at all?
A. No, sir.
Q. I believe you were the rear brakeman, were you not?
A. Yes, sir.
Q. And as rear brakeman did you have any duties to perform just immediately following the engine or the tender?
A. No, sir.
Q. Do you recall whether or not you saw anyone coupling onto the tender, coupling or uncoupling cars on that trip or during the time that you were out with that train?
A. No, I don't remember of being close. I know, of course, there was couplings made.
Q. Tell the jury whether or not couplings were made frequently or otherwise on that trip?
A. Yes, I suppose they were. They could not work without making couplings.
Q. Did you come into the city with Mr. Moore when he was brought in?
A. Yes, sir.
224 Q. I wish you would tell the jury whether there was anything done with the tender, that is the coupling apparatus on the tender prior to the time that it was brought into the city of St. Joseph? That is, was there any repairs made or anything of that kind?
A. I think not.

Q. Now, how was Mr. Moore brought into the city?
A. In our caboose.
Q. In your caboose?
A. Yes, sir.
Q. And what was the caboose coupled to?
A. To the engine.
Q. To the tender or the engine?
A. To the tender.
Q. To the tender?
A. Yes, sir.
Q. Who coupled it to the tender?
A. I don't remember.
Q. Do you remember who coupled it to the tender on that occasion?
A. No, sir.
Q. Did you hear anything about anything being wrong with it when it was coupled onto the caboose on that occasion?
A. No, sir.
Q. Did you see it coupled on there, or do you know, do you have any recollection on that subject?
A. Well, Mr. Coy set our train out and coupled onto the caboose and got ready to come in.
Q. Tell the jury whether or not it would be either one of you, either you or Mr. Coy that coupled onto it?
A. Yes, sir; it would be one of us.
Q. It would be one of you?
A. Yes, sir.
Q. Now, if you did make the coupling on there, tell the jury whether or not there was anything wrong with it?
A. Well, no; not that I know of.
225 Q. When you arrived in St. Joseph, tell the jury whether or not you saw anyone making any examination of the tender or anything of the kind, or prepared to make an examination?
A. I did not.
Q. You did not go down to the round-house with it?
A. No, sir.

Cross-examination by Mr. Mytton:

Q. You don't remember whether or not you made the coupling, do you?
A. No, sir.
Q. You have no recollection whatever?
A. No, sir.
Q. You have no recollection of whether Coy made it or yourself, Mr. Sheperd?
A. No, sir.

C. F. Coy, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

226 Q. Are you a brakeman at the present time for the St. Joseph and Grand Island Railway Company?

A. Yes, sir.

Q. Were you braking for this company at the time Mr. Moore was injured at Marysville, Kansas?

A. Yes, sir.

Q. Were you working with Mr. Moore on that day, on the date he was injured?

A. Yes, sir.

Q. On what train was it?

A. Train 14.

Q. Train 14?

A. Yes, sir.

Q. And what engine, if you know, and tender?

A. Engine 45.

Q. Engine 45?

A. Yes, sir.

Q. Did you witness the accident?

A. No, sir.

Q. Do you know how the tracks run in the city of Marysville, that is the Grand Island tracks?

A. Yes, sir.

227 Q. I believe their tracks run practically north and south through Marysvile?

A. Yes, sir.

Q. The general trend of the road is from east to west and northwest—southeast and northwest?

A. Yes, sir.

Q. We will suppose that the lines I make upon the map here represent the railroad tracks of the Grand Island Company, and that the point indicated here where I have the pointer is the switch stand that Mr. Moore was standing by, or near just before he was injured. (Indicating.) With that statement do you understand the map there?

A. Yes, sir.

Q. Where were you at the time the accident occurred, Mr. Coy?

A. Well, I was back on the cut-off where it goes into the passing track.

Q. What direction would that be from the switch point?

A. North.

Q. About how far north were you from the place of the accident at the time it occurred?

A. I should judge about six or eight car lengths.

Q. About six or eight car lengths? And how long are the cars?

A. Thirty to forty or fifty feet.

Q. And what were you doing? Were you upon the ground?

A. Yes, sir; I was on the ground walking back.

Q. Had you gone down with the two cars that were picked off or set off down there?

A. I was going to them at the time.

Q. You had not gone down with those two cars?

A. Yes, sir.

228 Q. But you were walking down to them at the time you say the accident occurred?

A. Yes, sir.

Q. What first attracted your attention?

A. I heard someone holler.

Q. And when you heard this noise, what did you do?

A. I looked around.

Q. What did you see at the time you looked around?

A. I saw them looking under the engine.

Q. Was the engine stationary or moving at that time?

A. It was stopped at that time.

Q. Did you go up to the scene of the accident?

A. Yes, sir.

Q. What did you do when you got there—that is, where was Mr. Moore?

A. Well, by the time I got there they had brung him out and laid him out on the opposite side of the track.

Q. And where was the engine at the time?

A. Standing right there where they brung him out.

Q. Standing right there?

A. Yes, sir.

Q. Did you remain about the scene of the accident for some little time?

A. For a little while.

Q. With respect to the switch stand, where was it that they took Moore out from under the engine, that is what direction from the switch stand?

A. North.

Q. And about how far north of the switch stand?

A. Well, I should judge fifty or sixty feet.

Q. Did you see any part of his hand or fingers laying along the track at any place there?

A. No, sir.

229 Q. You did not observe anything of that kind?

A. No, sir.

Q. Did you notice his glove or any part of his glove laying along there anywhere along the track?

A. I did not notice it laying along there any place.

Q. Where did you see it, if you saw it?

A. Somebody picked it up.

Q. Somebody picked it up?

A. Yes, sir.

Q. Who had it and where was it when you saw it?

A. I don't remember who had it. Whoever had it, it was right along there, right there close some place to where the accident happened.

Q. Did you notice what was done with it?
A. No, sir.
Q. You did not notice what was done with it?
A. No, sir.
Q. Did you go up to the house with Mr. Moore, the house he was taken to?
A. No, sir.
Q. You did not go up?
A. No, sir.
Q. Who was at the scene of the accident when you got there, what other man?
A. Mr. Miller and Mr. Pigg, and Mr. Sheperd went up with me.
Q. Do you know what Mr. Miller was doing up there?
A. No, sir.
Q. You don't know what he was doing there, yourself?
A. No, sir.
Q. Have you ever made any coupling to the tender upon this engine upon this trip, that is, this time you were out with it,
230 have you made any couplings yourself?
A. I could not say whether I had coupled to the engine or not.
Q. I mean, to the tender, to the rear end of the tender?
A. Yes, sir; I understand what you mean, but I don't remember positively of making any couplings.
Q. Did you ever hear or have any reason to believe or to know that the coupling apparatus upon that rear end of the tender was in any way defective or out of order?
A. No, sir.
Q. Had you ever heard of any complaint being made of that kind during the time you were working with or around the engine?
A. No, sir.
Q. I asked you the question if you ever coupled onto it and you said you did not recall. Did you ever uncouple anything from the tender?
A. I cut the engine off.
Q. When was that?
A. Just before it went down over the switch.
Q. Just before it went down over the switch?
A. Yes, sir.
Q. And in doing that did you use the coupling device on the rear end of the tender?
A. Yes, sir.
Q. Tell the jury how you did it? What method you used, or what method you proceded to uncouple it?
A. Just took hold of the lever and lifted it up.
Q. I wish you would tell the jury whether or not it acted properly when you did it?
A. It did.
Q. After the accident, what became of the engine and the tender?

231 A. Well, they stood there for some little time. I don't know just how long, and they took the engine and went down in front of the depot.

Q. Were any repairs of any kind or character made to the coupling apparatus upon the tender while the engine and tender yet remained in Marysville?

A. Not that I saw.

Q. Were you in a position where you could have seen it had it been done?

A. I was right around there most all the time.

Q. Was that same engine and tender brought into St. Joseph with Mr. Moore?

A. Yes, sir.

Q. That was the engine that hauled him into the city, was it?

A. Yes, sir.

Q. Do you know where the engine and tender were taken after they came into the city?

A. I cut the engine off of the caboose in the yard, and went to the round house and went that way.

Q. Did you cut the caboose off from the tender yourself down there?

A. Yes, sir.

Q. When you came in?

A. Yes, sir.

Q. I wish you would tell the jury if you had any trouble of any kind or character in cutting the caboose off from the tender at that time?

A. I did not.

Q. Tell the jury how you did it?

A. By lifting the pin.

Q. From the side or——

A. From the side.

Q. With the lever prepared for that purpose?

A. Yes, sir.

232 Q. The caboose as I understand was coupled into the rear end of the tender?

A. Yes, sir.

Q. And Mr. Moore was brought to the city in the caboose?

A. Yes, sir.

Q. Do*u* you know who coupled that caboose into the tender at Marysville?

A. I could not say.

Q. It would be either you or the brakeman, Mr. Shepard?

A. It would be one of us.

Q. If you did make that coupling yourself, did you have any trouble with it?

Mr. Parkinson: Now, your Honor, we object to that. He says he don't remember it.

The Court: Objection sustained. He has said that he does not

remember to have coupled it, and that he never heard of anything the matter with it.

Mr. Brown: He said he did not know whether he coupled it or not, either he or Mr. Sheperd coupled it, he said.

Q. Well, did you ever at any time have any trouble that you know of in the coupling or uncoupling of a car from that tender?

A. Not that I know of.

Q. Was there anything wrong with that coupling apparatus on the day of the accident, Mr. Coy?

Mr. Parkinson: We object to that. He has not shown that he knew the condition or had any opportunity of knowing it—just to express an opinion of that kind without stating the facts.

Mr. Brown: He said he had uncoupled it.

233 The Court: He has shown that he knew after the accident.

Mr. Brown: And he has shown that he knew before. He said he was the one that uncoupled the car before the accident occurred.

The Court: Well, I believe he did; objection overruled.

Q. Tell the jury whether or not there was anything wrong with that coupling apparatus that day?

A. There was not at the time I used it.

Q. Had there ever been anything wrong with it so far as you know?

A. No, sir; not as I know of.

Q. Were you down at the destination of the engine when the mechanic came down there to examine the coupling apparatus on the engine?

A. No, sir.

Q. You were not there at the time?

A. No, sir.

Cross-examination by Mr. Mytton:

Q. You have no distinct recollection of making a coupling that day?

A. No, sir.

Q. Did you examine the track that day?

A. No, sir.

Q. How?

A. I did not make any examination any more than just look around there.

Q. Did you see any blood there?

A. I saw blood on the rail.

Q. Where was the blood from the place where you took his body from under the engine?

A. Well, I should judge about ten or fifteen feet south.

234 J. T. FORREST, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

235 Q. Mr. Forrest, do you recall whether or not,—I believe it was the 9th day of June, 1910, you were asked to make an inspection of Engine 45 for the St. Joseph and Grand Island Railway Company?

A. Yes, sir.

Q. Who else was with you when you made this inspection?

A. Our car foreman, Mr. Alberts.

Q. Your car foreman?

A. Yes, sir.

Q. Was there anybody else present when you made the examination except your car foreman?

A. Mr. Frank Slayton, the master mechanic.

Q. He was the master mechanic of the St. Joseph and Grand Island Railway, was he not?

A. Yes, sir.

236 Q. What inspection did you make of what part of the engine?

A. I inspected the tender as to the safety appliances.

Q. Does that refer to the coupling apparatus?

A. To the coupling apparatus and the grab-irons and the pin lifter, and so forth.

Q. To the grab-irons and the pin lifter and the coupling apparatus?

A. Yes, sir.

Q. What engine was that, if you know, and tender?

A. Engine 45.

Q. Engine 45?

A. Yes, sir.

Q. I will have you to look at Exhibit,—Defendant's Exhibit 5, and tell the jury if that is a correct photograph of the en-

237 gine that you examined, or the tender, or the rear end of it?

A. Yes, sir.

Q. I wish you would tell the jury what facilities were on the rear end of the tender, that is, in the way of grab-irons or hand-holds or anything of that kind?

A. There was a corner grab-iron on the rear of the tank on each side and a pin lifter; on the buffer beam of the tank that was used as a grab-iron, and I measured the clearance—and they had stirrups for steps, and open step. I measured the distance of that from the rail, it was about eighteen inches, with a fifteen-inch opening; the coupler is 33½ inches from the top of the rail to the center of the coupler, and the grab iron had 2½ inches clearance.

Q. Now when you say the grab-iron had 2½ inches clearance, what grab-iron are you referring to specifically?

A. The grab-irons on the corner of the tank.

Q. The grab-irons on the corner of the tank?

A. Yes, sir; and the pin lifter also had 2½ inches clearance.

Q. That was the rod that extended entirely across the rear end of the tender?

A. Yes, sir.

Q. Had a space of 2½ inches between the tender and the car and this iron?

A. Yes, sir; between the buffer beam.

Q. Between the buffer beam?

A. Yes, sir.

Q. And the rod itself?

A. Yes, sir.

Q. Tell the jury whether or not that rod extended entirely across the end of the tender, something like the stick that I hold in my hand extends across here?

A. No, sir; I think as near as I can remember it was be-
238 tween eight and nine inches inside the end of the beam.

Q. That is, it sets in at the end of the tender some eight or nine inches at each corner?

A. Yes, sir.

Q. Was that the way the pin lifters usually sat in these safety appliances?

A. The law calls for between seven and fourteen inches.

Q. Between seven and fourteen inches?

A. Not more than fourteen inches and not less than seven inches.

Q. Not more than fourteen inches and not less than seven inches?

A. Yes, sir.

Q. That is the law requires that it set in at least seven inches?

Mr. Parkinson: We object to that statement; that is highly improper.

The Court: Objection sustained.

Q. Anyhow, these set in from the corner how much?

A. Between eight and nine inches.

Q. How was the end of this shaped?

A. It was in a bow shape.

Q. That is a handle to it?

A. Yes, sir; with a handle.

Q. That came down?

A. Bowed around and bent under so as to give it clearance.

Q. And as I understand in the center of this rod was the pin-lifting device?

A. Yes, sir.

239 Q. That you would raise the lever here, and that would turn it and throw the pin or rod without having to go in between the tender and the other car?

A. Yes, sir.

Q. And you say that the rod set out from obstruction behind it, 2½ inches in the clear?

A. Yes, sir.

Q. Tell the jury what that rod is used for, and what is the object of having that set out 2½ inches from the tender, if anything?

A. To clear the buffer beam so that a man can get a hold of it in getting off and on the step of the tender.

Q. Tell the jury whether or not that was used as a grab-iron?

A. Yes, sir; it is used as a grab-iron to get on and off the tender, on the stirrup, if they need to use it.

Q. Now how high was this grab-iron, this rod that extended entirely across there, how high was it from the end of the track or the rail?

A. I did not measure it.

Q. Could you estimate, do you know anything about that?

A. No, I do not.

Q. How high it would be?

A. It would probably be about forty or forty-five inches, I should judge.

Q. Probably be something like forty-five inches you think?

A. Yes, sir. I am not sure as to that. I did not measure it.

Q. Do you know the height of the knuckle?

A. Yes, sir; 33½ inches.

Q. 33½ inches?

A. Yes, sir; from the top of the rail, from the center of the knuckle.

240 Q. Now look at the photograph of engine 45, and see whether that would refresh your memory about the height of the grab-iron? (Handing witness the picture.)

A. No; the only way that I could estimate the height of that is by the thickness of the beam from the center of the knuckle,—figuring it from the center, those are about 10-inch beams, I think, and that would figure about 12 or 13 inches, to the top of the grab iron.

Q. In addition to the iron that you have described going across there, I will ask you if there was any ladder extending up the end of this tender, that had irons on that running across this——

A. No, sir.

Q. To refresh your memory—I wish you would look at the photograph and see whether or not there is any ladder on it?

A. I don't remember of noticing the ladder. I must have done it, but I don't remember of noticing it.

Q. In any event at the corner of the tender there is another iron, that is the iron that came out here, a grab-iron here, that extended all the way down or was there?

Mr. Parkinson: We object to the leading questions. They are all leading.

The Court: Do not lead the witness.

Mr. Brown: I don't mean to lead. State what, if anything, there was on the corner of the tender.

A. There is a grab-iron on each corner of the ladder of the tank.

Q. And what is there down lower, if anything at the corners?

A. There is a step, a stirrup, an open step.

241 Q. Of what is that made?

A. I think about half by two bar iron.

Q. Of what metal, iron?

A. Yes, sir; wrought iron.

Q. What inspection did you make of the coupling apparatus?

A. I opened the coupler several times.

Q. Did you make any other examination of it, look to its parts?

A. And inspected the coupler and knuckle, and everything worked all right.

Q. I wish you would tell the jury whether the pin or any part of the coupling device was bent or otherwise out of order in any way?

A. No, it was not.

Q. Tell the jury how the coupling device worked, whether it would work with the lever at the side or otherwise?

A. It worked with the lever from the outside. You could stand from the outside and pull it from the outside and raise the lock pin and open the knuckle the full width.

242 Cross-examination by Mr. Mytton:

243 Q. Now what do you mean by the buffer beam?

A. The beam that extends across the end of the tender.

Q. And where in reference to that buffer beam did you say that the pin-lifting rod was?

A. On top.

Q. On the top?

A. Yes, sir.

Q. And how close to the top?

A. It is about 2½ inches.

Q. Above the top?

A. Above the top; yes, sir.

Q. When you examined it that day, do you know whether or not it sagged down in the center?

A. It did not.

244 Q. Stood perfectly straight?

A. Yes, sir.

Q. What are those two steps on each side of the tender and attached to the buffer beam, is that used for railroad men to ride upon?

A. Yes, sir.

Q. What do you call those? Do you call those steps or a ladder?

A. They are steps.

Q. That is the correct name? Do you call the other the pin-lifting rod?

A. Yes, sir.

Q. And that pin-lifting rod's purpose is for the purpose of pulling the pin up, and that couples or uncouples the engine, is that correct, Mr. Forrest?

A. Yes, sir.

Q. And then in the center of the pin-lifting rod is the chain which is connected with the coupler, that is correct?

A. Yes, sir.

Q. Now then, whereabouts was the buffer beam in reference to the iron tender of the engine?

A. At the rear end of the tender.
Q. Was it directly beneath it?
A. Yes, sir.
Q. Would you say that the iron of the tender came out flush with the buffer beam?
A. No.
Q. How would that be, what is your recollection on that point?
A. It would probably be about six or eight inches.
Q. Do you think that the buffer beam is out, projects out six or eight inches from the iron of the tender?
A. Yes.
Q. That is, from the body of the tender that held the coal?
A. Yes, sir.
245 Q. It was in the rear that much?
A. Yes, sir.
Q. And projected out?
A. Yes, sir.
Q. And are you as sure of that fact as you are of any other fact that you have testified to?
A. I did not measure the distance; no, sir.
Q. That is your best recollection?
A. That is my best recollection.
Q. That is your judgment, six to eight inches?
A. Yes, sir.
Q. How was that pin-lifting rod held in place, do you remember?
A. In brackets.
Q. Brackets?
A. Yes, sir.
Q. Fastened to what?
A. Fastened to the bumper beam.
Q. Do you remember how many there were?
A. Three or four.
Q. Four?
A. I think there was four. I am not positive about that.
Q. Do you remember how many links there were in that chain?
A. I do not.
Q. Could you estimate about how many there were?
A. Yes, there is about three or four generally.
Q. Generally? But in this particular one, did you notice?
A. No, sir; I did not notice it; I did not measure it.
Q. Let me understand—the correct names of those different things you have mentioned is the steps on the side, pin-lifting rod, and the chain, coupler, steam hose and the air hose and the bell
246 cord, is that correct?
A. No, sir; there is no bell cord back there.
Q. Signal cord?
A. Signal hose; yes, sir.
Q. Those are the correct names?
A. Yes, sir.
Q. What is a grab-iron?

A. It is a piece of iron formed and placed for a man to get a hold of.

Q. What is the length of those grab-irons usually?

A. They vary, in different lengths, it depends on the position they are in on the tank.

Q. Well, I am asking you generally, what is the length of those grab-irons?

A. The grab-iron on the corner of the tank reaches from the top to the bottom.

Q. I am talking about the ordinary grab-iron how long would they be?

A. I think probably run from eighteen to twenty-four inches.

Q. From eighteen to twenty-four inches?

A. Yes, sir.

Q. Now, then, those grab-irons—assuming, for instance, Mr. Forrest, that this is the near end of the engine, and assuming that along here is the buffer beam, and those grab-irons would be on either side of the coupler, wouldn't they, a distance of about eighteen to twenty-four inches?

A. There is not any on this tank of that description.

Q. You say there is not any of those grab irons on that tank of that description?

A. No.

Q. Now, you know what you are talking about when you say those grab-irons are about eighteen to twenty-four inches long?

A. Yes, sir.

247 Q. And how far out do they come from the buffer beam?

A. 2½ inches or more.

Q. Now you saw this particular engine 45, didn't you?

A. Yes, sir.

Q. And if you would see that engine you would recognize it again, wouldn't you?

A. Yes, sir; I would.

Q. Now, Mr. Forrest, I hand you a photograph of engine 45? (Handing witness a picture.)

A. Yes, sir.

Q. The identical one that you examined, is it not?

A. That looks like the same tender, yes.

Q. Here in that photograph?

A. The same number; the same class.

Q. Here in the buffer beam are those two identical grab-irons that you have been testifying were eighteen to twenty-four inches in length on each side of that coupler?

A. Those were not on there.

Mr. Brown: Wait just a minute.

Mr. Mytton: I will ask you if those——

Mr. Brown: (Interrupting). Just a moment. I desire to object to anything that occurred after the time of the accident, your Honor, as not competent.

Mr. Mytton: I am identifying the matter of the grab-irons.

Mr. Brown: I am saying it is not proper, your Honor.

Mr. Mytton: Is that a grab-iron, that you were speaking about, eighteen to twenty-four inches?

248 A. Yes, sir.

The Court: Wait just a minute.

Mr. Brown: I am objecting to any condition that existed after the date of the accident, your Honor.

The Court: Well, unless the tender was in the same condition——

Mr. Brown: Yes, unless the tender was in the same condition afterwards that it was at that time.

Mr. Parkinson: This is for the purpose of showing what a grab-iron is. We want to show what a grab-iron is. This witness knows what a grab-iron is, and we are showing him one in the picture to ask him if that is a grab-iron, and that is the purpose of it.

The Court: It seems to be an effort to apply things to this same tender.

Mr. Parkinson: I can show your Honor the identical picture.

Mr. Mytton: When you are speaking about a grab-iron that is what you mean by a grab-iron, eighteen to twenty-four inches in length?

A. That is a grab iron.

Q. On each side of the coupler?

A. Yes, sir.

Q. And fastened to the buffer beam?

A. Yes, sir.

Q. And that grab-iron projects out from the buffer beam how far?

A. About 2½ inches or more.

Q. So that a man can reach his hand in?

A. Yes, sir.

249 Q. That is about the center of the buffer beam, on each side of the coupler, and equidistant from the top and bottom, is it about?

A. Just about; yes, sir.

Q. Now, can you state whether or not that is the identical pin-lifting rod that you saw there?

A. No, sir; I cannot.

Q. You cannot state whether or not it is?

A. No, sir.

Q. Now awhile ago you stated that on one side of the engine was the steam heating hose, is that the correct name?

A. Steam heat hose.

Q. And on the other side is the air hose?

A. Air hose.

Q. And on the other the bell cord?

A. Air signal hose.

Q. Air signal hose is the correct name?

A. Yes, sir.

Q. And I will ask you whether or not a chain extends from right between the air hose and the bell cord, down for the purpose of holding up the steam heating hose?

A. Sometimes there is and sometimes there is not.

Q. Sometimes the chain is there to perform that function and sometimes it is not?
A. Yes, sir.
Q. In this particular picture at which you are looking now, it performs that function?

Mr. Brown: We object to what that chain in the picture performs.

Mr. Mytton: I will ask you what the purpose of that chain in this picture is.
250 The Court: Is that a picture of this same engine?
Mr. Mytton: Yes, sir; after the accident occurred. I will ask you whether or not that is the customary way of fastening one of those grab-irons that you mentioned, on to the engine?
A. Yes, sir.
Q. I will ask you whether or not that is the customary way of equipping engines with these grab-irons?
A. Yes, sir.

(Said picture marked Plaintiff's Exhibit E.)

Redirect examination by Mr. Brown:

Q. I want to examine the witness about the picture, your Honor.
The Court: Very well, take your seat.
Q. As I understand you, the exhibit that was shown to you, is not a correct representation of the engine at the time that you saw it?
A. That is not; no, sir.
Q. But the exhibit that was handed to you and identified as Exhibit three, is that a correct representation at the time you saw it?
A. Yes, sir.
Q. And look at Exhibit marked "5," and state if that is also a correct representation of the engine at the time you saw it, or the tender, I mean?
A. Yes, sir.

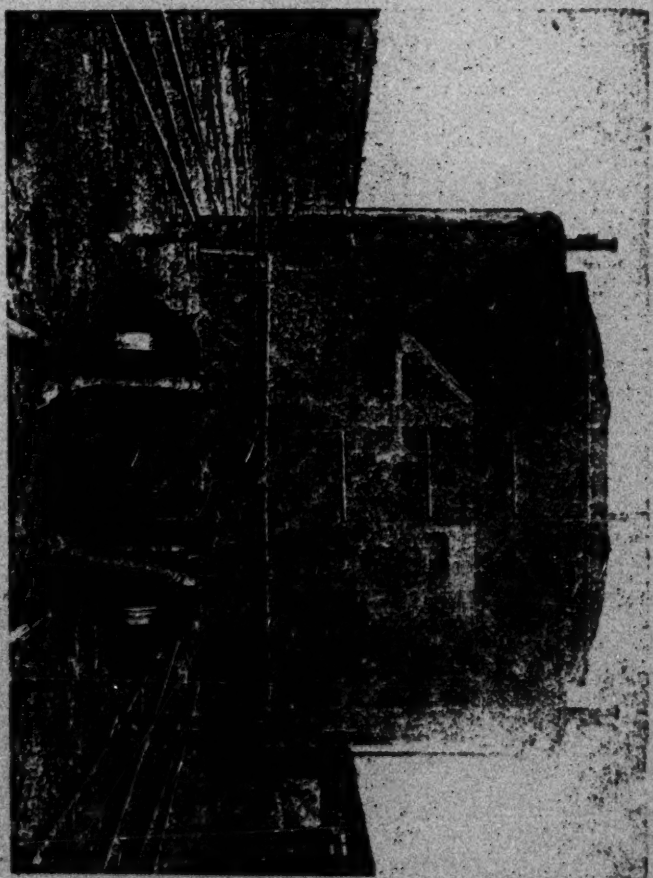
Witness dismissed.

Mr. Brown: I offer in evidence, your honor, exhibits marked "3," and "5."
251 Mr. Parkinson: There is no objection.
Mr. Brown: I want to show them to the jury at this time.
The Court: Pass them around, gentlemen. (Said exhibits were then offered and considered in evidence and are as follows:)

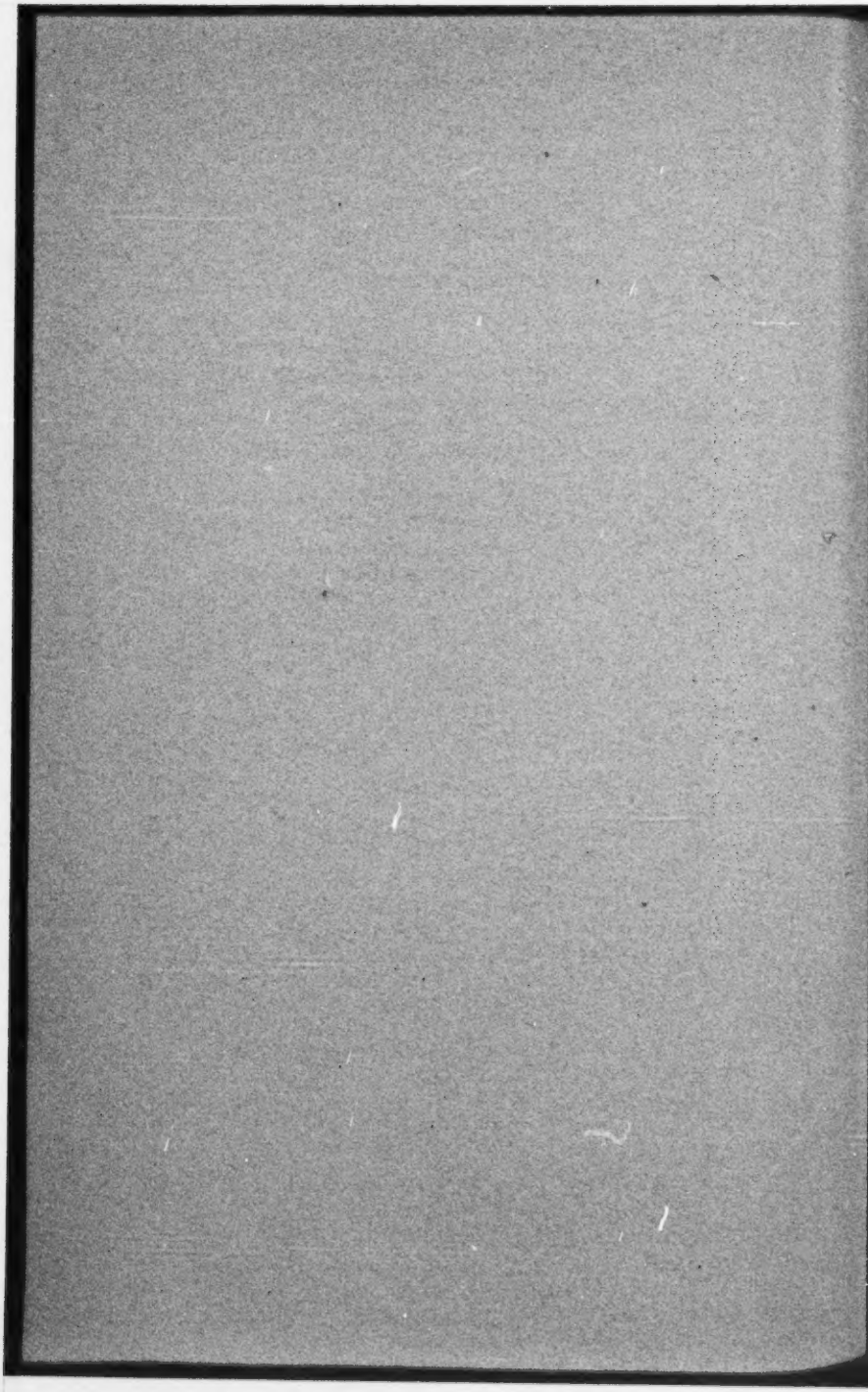
(Here follows photograph marked p. 252.)

Said exhibits are as follows:

No 573 St J & G I R R v Moore } # 252.



Defendant's Exhibit 3



253 C. H. CONKWRIGHT, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?
A. C. H. Conkwright.
Q. Where do you live, Mr. Conkwright?
A. 2604 Seneca.
Q. What is your business?
A. General foreman for the Rock Island.

254 Q. Now what examination did you make of this tender, I wish you would tell the jury?
A. I examined the coupler and the grab-irons.
Q. You examined the coupler and the grab-irons?
A. Yes, sir.
Q. What was the nature of the grab-irons upon that engine at the time you saw it, or anything that was used as a grab-iron?
A. The pin lifter was used for a grab-iron.

255 Q. Did you make any measurments to ascertain the distance that the pin lifter stood in clear of any obstruction?
A. It cleared two inches all along the line.
Q. It cleared two inches all along?
A. Yes, sir.
Q. What other devices were up on the end of the tender at that time that would be used by men as a hand-hold, if any?
A. There was a grab-iron on the corner of the tank, and a still step.
Q. On the corner of the tank, you mean?
A. Yes, sir.
Q. Do you know anything about there being a ladder in the center?
A. If I remember right, there was.
Q. And tell whether or not it had cross irons on it that could be used as a hand-hold also?
A. Yes, sir; they had a ladder on the end of the tank.
Q. Now at that time, in June, 1910, I wish you would tell the jury whether it was customary to have any other kind of grab-irons upon tenders at that time?
A. It was not required by law until September, 1910.
Q. Until September, 1910?

Mr. Parkinson: We object to that, and ask that it be stricken out.
The Co-rt: Yes.
Mr. Parkinson: That is not a fact, and we think it is improper for an impression of that kind to be given to the jury.
The Court: Yes, you need not tell the jury what the law is.

256 Q. I will ask you if prior to the time or at the time you made the examination, if it was customary for engines to have, or tenders to have upon them any other kind of grab-irons, than you found upon this engine at that time?

A. That was all.
Q. That was all?
A. Yes, sir.
Q. And tell the jury whether or not those were the only grab-irons that were used upon engines at that time?
A. It was.
Q. In the inspection of the engine that you made there, did you examine the coupling device?
A. I did.
Q. I wish you would tell the jury how it worked and whether it was defective in any way, and if so, in what way, just tell the jury all about it.
A. It was not defective; it was operative.
Q. You say you could operate it?
A. Yes, sir; it was operative.
Q. When you say it was operative, you mean from what position could you operate it?
A. From the pin lifter.
Q. From the pin lifter?
A. Yes, sir.
Q. Did you find anything bent about the coupling apparatus or defective in any way whatever?
A. I saw nothing bent when I examined it.

257 Cross-examination by Mr. Parkinson:

Q. You say that it was operative? You mean it was operative with difficulty, is that the idea, it was hard to operate?
A. No, sir.
Q. What do you mean when you say it was operative?
A. To take a hold of the end of the pin lifter and the knuckle would come open.
Q. Just without a bit of trouble?
A. Yes, sir; it was operative.
Q. Did you see the picture taken of this?
258 A. Yes, sir; there was a man come there to take the pictures before I left.
Q. Did he take the pictures before or after you examined the engine?
A. Well, he took it after I examined the engine.
Q. After you examined the engine?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. Did the coupler,—did the pin-lifting rod, that you examined sag down in the center?
A. No, sir.
Q. It was perfectly straight clear across the rear end of the engine?
A. Yes, sir.
259 Q. Mr. Conkwright, now what was this rod attached to?
A. It was put on with what is known as brackets.
Q. How many brackets?

A. Two.
Q. Are you positive that it had two brackets on it at that time?
A. Yes, sir.
260 Q. And by brackets you mean iron rods, iron attachments that held it, that ran up from the buffer beam?
A. Well, no, they are castings that are put on with two lag screws.
Q. What were they attached to?
A. To the end sill of the tank.
Q. To the end sill of the tank?
A. Yes, sir.
Q. And there were two of those?
A. Yes, sir.
Q. You are positive about that?
A. Yes, sir.
Q. And that ran up from the buffer beam or buffer sill?
A. Yes, sir; the end sill, we call it.
Q. And they were out of the end——
A. Yes, sir.
Q. And there was no sag between those two?
A. Not when I looked at it.
Q. Not when you looked at it?
A. No, sir.
Q. Between the two brackets at either end that held it there was no sag whatever?
A. No, sir.
Q. How far above the buffer beam did the rod run across?
A. Well, if I remember right it was right at the top of the sill.
Q. Just even with the top of the sill?
A. Yes, sir.
Q. It was not above the sill, was it?
A. I don't just remember about that, but it was near the top of the sill.
261 Q. For instance, if this is the buffer sill, the measurement you took, when you said it was two inches out on the frame—rear surface of the buffer beam out to that point, you say was two inches?
A. Yes, sir.
Q. And the measurement you distinctly remember of making was from the buffer sill out to that rod?
A. Well, I could not say, Mr. Parkinson, as to that.
Q. Where did you measure from?
A. Well, I measured the clearance of the pin lifter.
Q. And the clearance from where?
A. Well, from any obstruction of the pin lifter.
Q. Well, it ran along by the buffer beam, did it, just at the top?
A. Well, I could not say as to that. Some of them had a plank on top of the end of the end sill.
Q. Some of them had a plank?
A. Yes, sir.
Q. You went there to notice it particularly, that was the purpose of it, wasn't it?

A. Well, I went there to inspect the safety appliances.

Q. And as you noticed it, the iron part of the body of tender, which held the coal, it came out flush with the timber?

A. I believe it did; yes, sir.

Q. It was not in six inches, was it, the buffer beam did not extend to the rear six inches?

A. I don't remember about that.

Q. You don't remember whether it did or not?

A. No, sir.

Q. You don't remember anything about it?

A. No, sir; I don't remember a thing about it.

262 Q. These hand holds that are on the side, a man could not use them when he was in opening the knuckle or closing a knuckle, could he, he could not reach them and reach in?

A. No, sir.

Q. They were of no use in coupling or uncoupling, and served no purpose in the security of a man in coupling or uncoupling?

A. No, sir.

Q. Could not?

A. No, sir.

Q. But you do think that the iron rod was out far enough that was supported to these two things at the end, to hold on, do you, Mr. Conkwright?

A. Yes, sir.

Q. It cleared two inches?

A. Yes, sir; the pin lifter.

263 Q. You know what a hand-hold is or a grab-iron is, don't you?

A. Yes, sir.

Q. That is what is meant by a grab-iron or a hand-hold, isn't it? (Handing witness a picture.)

A. It is.

264 Q. That is what has always been known as a grab-iron or hand-hold, is it not?

A. Yes, sir.

Q. How?

A. Yes, sir.

265 Recross-examination by Mr. Parkinson:

Q. What is a grab-iron?

A. It is a safety appliance for employees.

Q. What is the length of it?

A. Well, it varies in the position that they are put on.

Q. Those that are placed on the rear of a tender on the buffer beam, what is the length of those grab-irons?

A. That are used now?

Mr. Brown: That is objected to as what they are or what they were at that time, your Honor.

The Court: Yes, sir; confine it to the time of the accident.

Q. At that time? At that time?

A. At that time there was not none required on the end sill.

266 Q. At that time there were no hand-holds or grab-irons on the rear end of the tender, were there?

A. No, sir.

Redirect examination by Mr. Brown:

Q. I wish you would tell the jury what purpose the rod that extends entirely across served in addition to operating the coupling device, if any, and the object of having it some two inches in the clear, as you say?

A. That was used then as a grab-iron.

Mr. Parkinson: We object to that as a mere conclusion. He don't know what the purpose of putting it on was; he don't ask him what the customary use of it was. This witness does not know.

The Court: Objection sustained.

Q. Do you know what the rod was customarily used for, at that time?

Mr. Parkinson: We object to that on the ground that the witness has not shown that he knew what the iron was, that he was in a position to know what the iron was, or that he worked around that character of work. He is a foreman in the shop.

The Court: He has been testifying more or less about grab-irons. If he knows he is competent to testify. You might ask him whether he does know or not.

Q. What was it customarily used for? What were they customarily used for?

A. It was customarily used then as a grab-iron.

Q. I will ask you if at that time on June 9th, 1910, if tenders at that time were equipped with any other kind of grab-irons than you see upon the rear end of this tender?

A. No, sir.

267 Q. At that time?

A. No, sir.

Witness dismissed.

H. C. DIETRICKSON, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

268 Q. Were you engine inspector for the Burlington on the 9th day of June, 1910?

A. Yes, sir.

Q. On that date were you called upon by any of the officials or any official of the Grand Island Company to make an inspection of an engine or tender of that company?

A. The Grand Island called up the Burlington and they sent me.

Q. Did you make an inspection of the engine and tender that day?

A. Yes, sir.

Q. What was the number of the tender and engine, if you know?

A. Number 45.

269 Q. Did you make any inspection of the coupling device?

A. Yes, sir.

Q. And did you make an inspection so as to see whether there were hand-holds or grab-irons upon the rear end of the tender?

A. Yes, sir.

Q. And did you make an inspection to see whether or not there was any steam hose attachments?

A. There was.

Q. I wish you would look at exhibit marked "5", and tell the jury if that correctly represents the rear end of the tender that you examined, as at the time you examined it?

A. Yes, sir; that is it as near as I can tell.

Q. How was the coupling device on the engine operated or on the tender operated, I mean? That is, was it an automatic device or how was it?

A. It was an automatic, and had what we call a lever, a coupling lever fastened to a lifter with a chain, and a clevice.

Q. Was the rod used, or was it customary to use that rod for any other purpose than merely the lifting of the chain or the pin in uncoupling?

270 A. Yes; they sometimes use it as a kind of a grab-iron, hand-hold.

Q. Did you make any measurements to ascertain how far this rod stood out from the tender in the clear, and if so, what was the distance?

A. I did not make any measurements, but from what I could see, it was somewhere near 2¼ or 2½ inches.

Q. Were there any other irons upon the rear end of the tender that were called or could be used as grab-irons or hand-holds?

A. Well, I think not. There was the one on the corner of the tank.

Q. On each corner of the tank, was there?

A. Yes, sir.

Q. And do you know whether or not it had any stirrups down at the corner that came down near the track?

A. Yes, sir.

Q. And do you know whether or not it had in the center or near the center a ladder that went up to the top, with cross bars in that?

A. Yes, sir; it had a ladder there.

Q. Tell the jury whether or not those rods that went across there might be used or was customary to use them as a hand-hold also, in case you wanted to take a hold?

A. Yes, sir.

Q. Now at the time you made this examination, June 9th, 1910, I wish you would state whether it was customary to have tenders, the rear end of tenders equipped with any other or different kind of

hand-holds, or grab-irons than those that you have described that were upon this tender at that time?

Mr. Parkinson: Your Honor, we want to object to that, for the reason that the law fixed the measure of duty on the railroad,
271 and the custom could not control it; the absolute law from the 1903 law required them to have these hand-holds, and the custom could not relieve them of the liability fixed upon them by law.

The Court: I have looked at that law of 1903, but I did not see any description of the hand-holds——

Mr. Mytton: It says grab-iron, your Honor.

Mr. Brown: We will call it a grab-iron, anything you want to, the grab-iron, something you can grab, an iron you can grab to.

The Court: If there is any distinction between a hand-hold and grab-iron, I don't know—it is called a grab-iron in the law there.

Mr. Brown: I know, your Honor, I understand the common definition; a man could not tell whether there is any difference in a grab-iron and a hand-hold; anything you can get a hold of would be called a grab-iron and a hand-hold.

The Court: That I don't know.

Q. Well, I will ask you if at the time you made this inspection, it was customary to have the rear end of tenders equipped with any other kind of grab-irons, than you found upon the rear end of this tender at the time you examined it?

Mr. Parkinson: We desire, your Honor, to object to that on the ground that the law fixes the duty, the law of 1903, enacted eight years prior to this, and that custom could not relieve them of the performance of the duty established by the Act of Congress.

272 The Court. Are you acquainted with the custom in that respect? Were you acquainted with the custom in that respect in June, 1910?

Mr. Mytton: On the Grand Island, your Honor.

Mr. Brown: The general custom of railroads?

The Court: The general custom on railroads.

A. Yes, sir.

The Court: You were acquainted with it?

A. Yes, sir.

The Court: Now what was the custom in that respect?

A. Well, they were equipping them, but they had not all been equipped.

Q. What was the answer?

A. I say, they were equipping them, but I think—I don't think the law was in effect.

273 Q. Do you know whether or not at the time of the accident, or at the time you inspected the tender of the Grand Island Company, whether at that time the Interstate Commerce Commission had made a ruling requiring railroad companies to equip their trains in any given or specific way with hand-holds?

A. They were not. We did not have anything.

274 Q. At the time you were down there did you inspect or examine the coupling device on this engine?

A. Yes, sir.

Q. I wish you would tell what you did, and how you examined it, what inspection you made?

A. One man that was a train man got up on the stirrup and he operated that pin lifter to show that the knuckle would open. I think he tried it three times, and each time it opened as good as any coupler could, and also got down on the ground and operated it from the ground standing outside of the rail, where the train man or anyone that operated a coupler would stand.

Q. Did you examine the coupler to ascertain whether

275 anything was bent or out of order or defective?

A. There was nothing defective about it.

Q. Speak a little louder, please?

A. No defects in it.

Cross-examination by Mr. Mytton:

276 Q. What do you call the iron that extends diagonally across there that connects with the chain that connects with the coupler, what do you call that? What is that?

A. Well, that is called two or three things.

Q. That is a pin-lifting rod, isn't it? Isn't it?

A. Well, they used to use them as a grab-iron.

277 Q. Isn't it a pin-lifting rod?

A. Both.

Q. Isn't it a pin-lifting rod, and didn't you a little while ago in response to Mr. Brown's question state that in making that test that the man took hold of the pin-lifting rod, didn't you? That is what you said, isn't it?

A. I remember when I started railroading we used it for a grab-iron.

Q. I am not asking you when you started railroading. Did you hear my question? In response to the question that Mr. Brown asked you, you said that the man stood on the stirrup but you mean he stood on the grab-iron, but you said he stood on the stirrup, and that he lifted the pin-lifting rod?

A. Well, you can call it that if you want to.

Q. It is a pin-lifting rod, isn't it? It was put there for the purpose of pulling up so that it would couple or uncouple the engine, wasn't it?

A. That is the main purpose.

Q. That is the main purpose. Now then this thing which was on the side of it was used as a stirrup, wasn't it? That is the stirrup, you called it a stirrup awhile ago?

A. A stirrup or a step.

Q. Well, either one, a stirrup or a step?

A. Yes, sir.

Q. Now what is a grab-iron?

A. A grab-iron is a rod of any kind that is attached to an engine or tender for the purpose of taking hold of in mounting.

Q. Yes, in mounting. But when you couple an engine or uncouple, you are not thinking about mounting an engine very much, are you?

A. Yes.

Q. You are? I will ask you when a man goes back to couple or uncouple, whether or not you have ever seen grab-irons on
278 the rear, on the buffer beam, on each side of the coupler?

Q. Have you ever seen it, Mr. Dietrickson?

A. Yes, sir.

Q. In other words, so there will be no question about it, I will ask you to look at this photograph here, and I will ask you to state what the iron is that is attached and riveted in the buffer beam on each side of the coupler? (Handing witness a photograph.) What do you call that?

A. It would be a hand-hold or grab-iron.

Q. And that hand-hold and grab-iron is used for that purpose and that alone, isn't it, in connection with coupling or uncoupling cars, isn't it?

A. We sometimes use that as a step.

Q. You undertake to tell this jury, do you, that this grab-iron was sometimes used as a step?

A. It is.

279 Q. But that is not the proper function of it, because the step is on the side isn't it?

A. Well, there would be times you would have to use it as a step.

Q. That you would have to use it as a step?

A. Yes, sir.

Q. That is the correct name of it, is a grab-iron or hand-hold, isn't it?

A. A hand-hold.

Q. Now what is the length of that grab-iron or hand-hold?

A. I believe they specify sixteen inches.

Q. Sixteen inches?

A. Yes, sir.

280 The Court: Is there such a device or attachment on the railroad cars or tenders that railroad men in common parlance call a grab-iron?

A. How is that, your Honor?

The Court: Is there any attachment to a car or tender that railroad men call a grab-iron?

A. Yes, sir.

The Court: Well, go ahead; objection overruled.

To which action and ruling of the court the defendant then and there duly excepted and still excepts.

Q. Now then you say that there is. Will you describe it to this jury, please, the size of it?

A. Well, it is a rod attached to a car or engine, some of them

made of ⅝ inch iron. I think the shortest ones are something like sixteen inches and then some of them are several feet long.

Q. Now then, how are those grab-irons usually fastened to the beam of the tender of the engine?

A. Put on with lag screws.

281 Q. Will you look at this photograph, please, and state what that is screwed onto that buffer beam with?

A. I could not tell you.

Q. You could not tell that?

Mr. Brown: We object to that as immaterial.

The Court: Objection overruled.

To which ruling the defendant excepted at the time and still excepts.

Q. You could not tell from that, you say? Did you say ⅝ inch iron, made of ⅝ inch iron?

A. Yes, sir.

Q. What is the usual distance from that iron to the buffer beam or brake beam?

A. Well, it is at least two inches.

Q. From two to three inches?

A. Preferably two and one-half inches.

282 Q. So that a man can reach in and around to hold on while he is doing his work there at the coupling pin, is that correct?

A. Yes, sir.

283 M. A. HARTIGAN, in continuation of his deposition commenced on the 10th day of January, 1912, on his oath further says:

Examined by R. A. Brown:

Q. How long have you lived in Norfolk, Mr. Hartigan?

A. About three months.

Q. Prior to coming to Norfolk did you live in St. Joseph, Missouri?

A. Yes, sir.

Q. While living there were you employed by the St. Joseph and Grand Island Railway Company?

A. Yes, sir.

284 Q. In what capacity?

A. Assistant superintendent.

Q. How long had you been employed by the Grand Island Railway Company before coming to Norfolk?

A. Nearly three years the last time, although I was employed by the Grand Island Company for a period of about five years before. In the meantime, being with the New York Central Railroad.

Q. In New York City?

A. In New York City.

Q. While in St. Joseph, Missouri, did you know of an accident that occurred to one Ralph W. Moore?

A. Yes, sir.

Q. Were you present at the time the accident occurred?

A. No, sir.

Q. How soon thereafter did you go to the scene of the accident?

A. I was on the scene of the accident within about four hours after it happened.

Q. Where were you at the time the accident occurred?

A. I was in the office, in my office at the Grand Island headquarters in St. Joseph.

Q. Did the news reach you by wire or otherwise?

A. It was sent to me by telegram.

Q. And did you immediately take the train for the scene of the accident?

A. As I remember it, we received the telegram a few minutes before the departing time of the west bound passenger train in the morning, and I took that passenger train to Marysville.

Q. Did you go to the scene of the accident after you arrived in Marysville?

A. Yes, sir.

285 Q. In company with whom, if anyone?

A. I first went to the scene of the accident with Mr. Lonergan, our agent at Marysville, and with Mr. Miller, who was, at that time, section foreman at Marysville.

Q. When with these gentlemen at the scene of the accident did you make any investigation to ascertain at what spot, or what point, the accident had occurred?

A. Yes, sir.

Q. I wish you would state, in your own way, what you did, and what evidence of the accident you found, if any?

A. We looked the ground over carefully, and found a patch of blood on the rail, and a few small particles of flesh where the engine had evidently first passed over Moore's hands, and in the crotch of the frog, where Mr. Moore finally lodged, there was blood spattered.

Q. Where, with respect to the switch stand, was it that you discovered the first blood?

A. We took actual measurements. I have not the notes which I made at that time, so I cannot tell exactly, but it was about midway between the switch stand and the frog, or about thirty feet.

Q. West of the switch stand?

A. West of the switch stand.

Q. Did you see any blood, or any evidences of the accident between that spot of blood and the switch stand?

A. No, sir; there was apparently nothing there.

Q. Was this blood, you have described, on the rail, or on the ground, or where was it?

A. It was over the rail, and spattered on the tie.

286 Q. After you made this examination, with the gentlemen you have named, did you have anyone else come to the scene of the accident with you, and, if so, whom?

A. Yes, sir; I had Mr. Guthrie, a furniture dealer in Marys-

ville, Mr. Thompson, a wholesale produce commission man, of Marysville, and the owner of a lumber yard. All of them three business men. I do not remember now the name of the lumberman who was with us. There was also a man there, at the time we looked over the ground, and took the measurements, by the name of Baughman or Baufman.

Q. How soon after you made the first inspection was it that you all went there with the gentlemen you have named?

A. As I remember it, I stayed up at the switch, looking around, while Mr. Lonergan went to call these three business men and a photographer to take the pictures. I believe I sat down on the ground and waited.

Q. When these business men, and this other man, Baughman, you have referred to, arrived upon the scene, and when you took measurements, and made further investigation, was this done in the presence of Mr. Baughman?

A. Yes, sir.

Q. During this investigation did you converse with Mr. Baughman, and the other men, as to the place where the accident had evidently occurred?

A. Yes, sir.

Q. Did you, in his presence, make a careful seach for blood stains, or other evidences of the place where the accident had occurred?

A. Yes, sir.

Q. And was Mr. Baughman working along with you, and assisting in making this investigation, and observing what was being done?

A. He was observing what was being done, listening to
287 what was being said between these merchants, Mr. Lonergan, Mr. Miller and myself, and, as I remember, occasionally making a remark himself.

Q. Was there any conversation between you men at the time, as to the place where the accident had occurred?

A. Yes, sir.

Q. And was this conversation in the presence of Mr. Baughman?

A. Yes, sir.

Q. Did Mr. Baughman, at that time, make any suggestion or statement differing with the conclusion arrived at by any of the parties present?

A. No, sir.

Q. Did he, at that time, say anything about having picked up one of the plaintiff's hands, and, if so, at what point he picked it up, or anything to that effect?

A. He said nothing about it.

Q. Do you know what was done with Mr. Moore after the accident occurred?

A. Yes, sir.

Q. Just state, please?

A. He was brought to St. Joseph and put in the Sisters' Hospital, under the care of Dr. Wallace, our chief surgeon, and Dr. Todd, his assistant.

Q. After Mr. Moore had been operated on, and was convalescing and able to sit up, or be up, did you visit him at the hospital, and, if so, about how often?

A. I think about twice. The first time two or three days after the accident, and the second time probably a couple of weeks. I cannot remember now.

Q. During the last visit, that you have referred to, did you have any conversation with Mr. Moore as to how the accident had occurred?

A. I had a conversation both times.

Q. I wish you would proceed and state, in your own lan-
288 guage, what you said to him, and what he said to you, on the two occasions you have named, starting with the first—I mean with respect to how the accident occurred?

A. I asked him how he happened to get caught in that way. He said that the engine had passed down over the switch; he had thrown the switch, and signalled them to back up. He started across the track, around behind the engine, as it was backing up, and in some way he stumbled and fell; that he did not know exactly how he tripped or stumbled, but that he went down. He further said that he did not think they would ever catch him.

Q. During the second visit that you made to Mr. Moore, which you say was some two weeks after the first, did you, at that time, have any conversation with him about how the accident had occurred?

A. On both occasions, we talked about this accident.

Q. And on the second occasion that you were there, did he again state to you how it occurred?

A. Yes, sir; he stated again that the engine was backing up, and he walked around the head of the tender to get on the other side of the track, and stumbled and fell.

Mr. Brown: I next desire to introduce in evidence the deposition of F. T. Slayton.

F. T. SLAYTON, of lawful age, being produced, sworn, and examined, on the part of the defendant, deposeth and saith:

Examined by Mr. Brown:

Q. Where do you live, Mr. Slayton?

A. At present in Princeton, West Virginia.

Q. And in what business are you engaged?
289 A. Superintendent of motive power of the Virginian Railway.

Q. How long have you been with the Virginian Railway Company, as superintendent of motive power?

A. Since December 9th, 1910.

Q. Just prior to your coming to the Virginian Railway Company, were you employed by the St. Joseph and Grand Island Railway Company?

A. I was.

Q. Were your headquarters at St. Joseph, Missouri?

A. Yes.

Q. Do you remember the circumstances of a man by the name of Ralph W. Moore, being injured, while employed by the Grand Island Railway Company, in 1909?

A. I do.

Q. Do you know what engine he was with at the time the accident occurred?

A. Engine 45 of the St. Joseph and Grand Island Railway Company.

Q. I have forgotten to ask you in what capacity were you employed by the Grand Island Railway Company at the time this accident occurred?

A. As superintendent.

Q. As such superintendent, did you have charge of the rolling stock of the Grand Island Railway Company, the general supervision of it?

A. Yes, sir.

Q. Were you acquainted with this particular engine, 45?

A. Yes.

Q. Do you know how long this engine had been out of St. Joseph before this accident occurred, on this particular trip?

A. She had been making regular trips, and I am very sure she left St. Joseph the day before. I am not positive of that.

290 Q. Just prior to making this trip into Kansas, do you know whether or not this engine had made a trip to Kansas City with a passenger train?

A. She had, just a few days before.

Q. Do you know whether or not this engine was used alternately, or as required, as both a passenger and freight engine?

A. All of that class of engines were equipped with steam heat, for the purpose of being used in passenger service when we had sufficiently heavy trains to justify it.

Q. What was the condition of the coupling apparatus on this engine?

A. It was as near perfect as I ever saw a coupling apparatus.

Q. Were you present at the scene of the accident?

A. No.

Q. How soon after the accident did you see the engine?

A. I was at Sixth Street crossing, in St. Joseph, on the arrival of the engine and caboose which brought in the injured man, and went with the engine to the roundhouse yard, and inspected it closely, in the presence of others.

Q. Did you call in other parties for the purpose of having them inspect the engine with you?

A. I did.

Q. And in what condition did you find the coupling apparatus at that time?

A. It was working perfectly, from either side of the engine.

Q. And was this engine equipped with an automatic coupler?

A. Yes, the automatic coupler, with an uncoupling lever, ex-

tending across the rear of the tank, so that it could be operated from either side.

291 Q. Without going in between the cars to operate it?

A. There was no necessity whatever for going between to operate it.

Q. Did you use the device attached to this coupler to ascertain whether or not you could operate it from the side of the tender, without going back to the knuckle?

A. Yes, from both sides of the tender, standing on the ground, and also by standing on the step, the sill step of the tender, on either side.

Q. Had there been anything wrong with the coupling device attached thereto upon this engine, at any time prior to the time of this accident, so far as you know?

A. None that I know of.

Q. Mr. Slayton, you spoke of this being an automatic coupler. I wish you would describe the character of the coupler upon the engine, and whether or not it was installed under your supervision, and state why you selected this pattern of coupler?

A. This was the Climax type of automatic couplers, which I had decided upon as a standard for our engines and cars, after having tested out a number of different couplers, and one of the main reasons for deciding to adopt this type of coupler as standard was the knuckle could be opened the full distance, from any position, without touching it with the hand. There is some make of couplers, while they would work well from fully closed position, when the uncoupling lever was operated, should the knuckle only be partly closed, you could not open them well except by taking hold of them with your hand, while this type and form of the unlocking device was such as to enable a person to open the knuckle fully, from any intermediate position. That one, I made the test, and found that it did operate the knuckle from any position between full

292 closed, and partially open. In fact, I found the coupler in perfect working condition, in every respect.

Thereupon court took a recess for the day.

Morning Session of Court, February 19th, 1912, 9:30 a. m., Before Judge Rusk and a jury.

J. H. McGoff, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?

A. J. H. McGoff.

Q. Where do you live, Mr. McGoff?

A. Topeka, Kansas.

Q. And what is your business at Topeka, Kansas?

A. Mechanical superintendent of the Santa Fe Railroad.

293 Q. As such superintendent are you familiar with the devices that are placed upon cars and tenders and engines or trains?

A. Yes, sir.
Q. Do you know what a hand-hold or a grab-iron is?
A. Yes, sir.
Q. I wish you would tell the jury what a hand-hold or grab-iron is?
A. It is a suitable hand-hold, made out of iron fastened to a car or locomotive to get hold of, grab a hold of.
Q. Prior to June 9th, 1910, or prior to the time that the Interstate Commerce Commission made any recommendation or provision as to the character of grab-irons and hand-holds——

The Court: And at that time——

Mr. Brown: And at that time,—I mean on the 9th day of June, 1910, and prior to the time the Interstate Commerce Commission made any rule on the subject——

294 Q. Were you familiar at that time with the custom that prevailed among railroad companies generally as to the character of hand-holds or grab-irons that were placed upon the rear end of their tenders?
A. Yes, sir.
Q. Now, I wish you would state what character of grab-irons or hand-holds were placed upon tenders prior to this time, and at that time?
The Court: Was there a prevailing custom, commonly in use among railroad companies in that respect at that time?
A. A common custom?
The Court: Yes.
A. Yes, sir.
Q. Just state what it was, please, what devices were used for that purpose?

The Court: I suppose your objection is made now, Mr. Parkinson, and it is overruled.
Mr. Parkinson: Yes. We want to object further on the ground that he has not qualified himself as to the custom,—even if he is competent to speak, he has not qualified himself as to the customary use by men or the purpose, for which anything that was on the car was used or might have been used by the man. He has not shown any knowledge of that, or whether they did comply with the law.
The Court: While his statement that he was acquainted with the custom, and that there was a custom would not be sufficient of itself, he also shows that he is a railroad man in the mechanical or traffic department of many years' experience; the objection is overruled.

Q. Just proceed to state, please, what devices were used for hand-holds or grab-irons upon the rear end of tenders, what was
295 customary to be used at that time?
A. On some tenders there were uncoupling levers which were used as hand-holds, also grab-irons.
Q. Where were the grab-irons placed, that is, what character of grab-irons were placed upon tenders at that time, and before any ruling was made, if the ruling was made?

Mr. Parkinson: Now we object to that, your Honor, the ruling.

The Court: The objection to the ruling is sustained, so far as the question as to the ruling is concerned.

Mr. Brown: I can ask it this way. Your Honor can understand I don't know whether he knows the date when any ruling was made or remembers what was done at the time this occurred. I will ask you this question: Do not state anything about any ruling, but do you know anything of the fact that any ruling of any kind was made?

Mr. Parkinson: We object to that as immaterial to any issue in this case.

The Court: Objection sustained. You can refresh his memory in any way about this matter, Mr. Brown—what we were talking about as to the time of this accident.

Mr. Brown: Your Honor does not seem to understand my point. It is only for this purpose and this purpose alone, to show that prior to the time that any ruling was made—now I don't know whether he knows that was July 10th, 1910, or in 1911, or 1912, but what I am getting at—I think it was made prior to the time any ruling was made prescribing anything—that is what I am getting
296 at, your Honor, and then I can show the time of the ruling.

The Court: Well, you can refresh his memory about anything.

Mr. Brown: That is the only possible object of it, your Honor.

The Court: Objection overruled.

Q. If you know of any ruling having been made requiring any kind of grab-irons, now prior to that time, that is what I am getting at, prior to that time what was customary to be used upon the rear end of tenders?

A. I don't remember any ruling prior to that, but I remember——

Q. I am not talking about any ruling prior to that time. That is the point I am trying to get at, before any ruling ever was made, if any ruling was made?

Mr. Parkinson: We object to that, your Honor. He has stated that he did not know that there was any ruling made by any Interstate Commerce Commission.

Mr. Brown: He said prior to that time.

Mr. Parkinson: He did not confine it to that.

The Witness: What I meant was the date——

The Court: You are trying to refresh the witness's memory, and you had better see if he knows anything about the ruling and its date.

Q. Do you know anything about any ruling having been made by the Interstate Commerce Commission requiring a certain kind of grab-iron?

297 Mr. Parkinson: That is objected to as incompetent.

The Court: Objection overruled.

A. Yes, sir.

Q. Now then, before any ruling was ever made, before the Interstate Commerce Commission made any ruling, what was then customary to be then used upon the rear end of tenders, that is what I am getting at?

Mr. Parkinson: We object to that question. It has not fixed any time with reference to the inquiry here.

The Court: He will fix that afterwards; objection overruled.

Mr. Brown: I will fix that afterwards.

A. There was a hand-hold put vertically on the tank, on the corners of the tank, and the uncoupling rod was run horizontally across the tender, they were used as hand-holds.

Q. I will ask you to look at the photograph marked Defendant's Exhibit 5, and tell the jury with respect to the photograph you have there, what was the usual custom with respect to equipping tenders with hand-holds or grab-irons at the time you are speaking of?

—. ——.

298 Mr. Brown: I will ask you whether or not it was customary *that* the time that I have named to equip the rear end of tenders in the manner—that is by the railroad companies to equip them in the manner that I have described?

Mr. Parkinson: We want to make the same objection. We understand the court's ruling.

The Court: Objection overruled.

A. Yes, sir.

Q. Do I understand that was the customary way of equipping them at that time?

A. Yes, sir.

299 Cross-examination by Mr. Mytton:

Q. Now, the correct name, Mr. McGoff, so there will be no question about it—let me put this up so you can see it, the correct name for this iron up and down here is a ladder, isn't it? (Indicating.)

A. Yes, sir.

Q. That is a ladder?

A. Yes, sir.

Q. And the correct name for this—that is the common
300 one, is the tender, is that right?

A. The end of the tender; yes, sir.

Q. And these iron things that go up on the sides are hand-holds?

A. Yes, sir.

Q. That is correct, isn't it?

A. Yes, sir.

Q. And the iron extending south of the buffer beam or below the buffer beam on that side, those are the steps or the stirrups upon which the men stand?

A. Yes, sir.

Q. And a man takes a hold of this lever, and to pull this coupler for the purpose of coupling or uncoupling, doesn't he, handles it

by the lever upon either side—with the pin lifting rod, I mean, the lever or pin lifting rod?

A. Yes, sir, for uncoupling.

Q. The correct name for that is the pin-lifting rod, isn't it?

A. Uncoupling rod.

Q. Uncoupling rod?

A. Yes, sir.

Q. A pin-lifter or uncoupling rod?

A. Yes, sir.

Q. Now then, a grab-iron is an iron about sixteen to twenty-four inches in length, that is fastened on to the end of the buffer beam, is it not?

A. Some of them; yes sir.

Q. Some of them. Let me show you the picture of the rear of the tender of an engine, and please look at the irons which are fastened in the buffer beam, about the center and on each side of the coupler, what is the correct name for those irons? (Handing witness a picture.)

A. Hand-holds.

Q. Hand-holds or grab-irons?

A. Or grab-irons; yes, sir.

301 Q. Now, those grab-irons or hand-holds are used in coupling or uncoupling cars, is that correct?

A. I may not understand you.

Q. I say, can they be used and should they be used in coupling and uncoupling cars?

A. In moving the coupler?

Q. Are they for the safety of the employees in coupling and uncoupling cars?

A. They are used there as a hand-hold.

Q. For the safety of the employees in coupling and uncoupling cars?

A. That is their purpose.

302 Q. Now, you know as a matter of fact that on June 9th, 1910, and for many years prior thereto, on hundreds of engines on the Santa Fe you have, and it was customary and has been for many years to have those grab-irons riveted or driven into the beam below the pin lifting rod and on each side of the coupler?

A. Some engines were equipped with hand-holds.

Q. Some engines were equipped and had been for years and years, but you know, do you not, that on the 1st of January, 1895, it was required that all cars and every car should be equipped with grab-irons on the rear?

Mr. Brown: That is objected to as to what he knew, what was required. The law fixes that as he says, and not the witness.

Q. Do you know anything about that?

The Court: Yes, the requirements of the law would govern that.

Q. You don't know anything about that?

A. No, sir.

Q. Now then, a moment ago you said that on the Santa Fe that

many of their engines had these grab-irons that I have shown you attached to the buffer beam on the rear of the engine. Now, it was the same customary practice to have this on engines of other railroads besides the Santa Fe, wasn't it?

A. I don't know.

Q. Do you know anything whatever about the other railroads?

A. Not positive.

Q. You are testifying fully and wholly then in this case as to the Santa Fe Railway Company?

A. Yes, sir.

303 Q. Now then, those grab-irons that you saw at that time and for many years prior to the 9th of June, 1910, that were riveted in the buffer beam, what would be the length of those grab-irons, about?

A. Some of them were longer than others.

Q. Oh, yes. What was the customary length of them?

A. Probably from fifteen to twenty-four inches.

Q. Fifteen to twenty-four inches?

A. Yes, sir.

Q. Now, that would be about fifteen to twenty-four inches. Now then, how far would they extend out from the beam of the tender, right below the tender?

A. I don't know the distance.

Q. About how far? About two and one-half inches?

A. No.

Q. About how far?

A. I think it is a greater distance than that.

Q. A greater distance than that? About two and one-half to three and one-half inches? What is your best judgment?

A. There is different locations.

Q. I am talking about in the rear now, as you have testified to. (Shows witness a photograph.)

A. Some of them are closer to the center.

Q. How far? How far? About three inches? Now, they are enough so that a man with a gloved hand who is coupling or uncoupling cars or switching could grab a hold of them with his hand without coming in contact with the tender, that is correct, isn't it?

A. I misunderstood you. I thought you meant from the outside.

Q. No, I don't mean from the outside, Mr. McGoff, I mean

304 how far would the iron rod extend from the beam of the engine?

A. Two and one-half to three inches.

Q. Two and one-half to three inches?

A. Yes, sir.

Q. So that it would afford a man greater security in coupling or uncoupling cars if he had a glove on, or if he had his naked hand, when he would reach over that way to perform his duty, is that correct?

A. A clearance to grab.

Q. A clearance, that is correct?

A. Yes.

Redirect Examination by Mr. Brown:

Q. Now, just a minute. At the time you speak of, suppose that a tender was so constructed as to have the coupler lever or the lifting rod so constructed as to be used, or could be used as a grab-iron, and have two and one-quarter or two or two and one-half inches in the clear, and located as you see it in the photograph of engine 45 there, just above the coupling apparatus, in a case of that kind so the coupling rod or uncoupling rod was constructed in that manner, was it ever customary to have in addition to that, any additional hand-holds or grab-irons, right under it on the beam, at the time of this accident?

Mr. Parkinson: That question is objected to on the ground it assumes that the picture shows that the pin-lifting rod is two and one-half inches out from the tender, when the picture shows for itself just where the rod is located in that respect.

Mr. Brown: I will change that to save any question.

305 The Court: He said that supposing the rod was that far. The distance of the rod as a matter of fact is a fact for the the jury.

Mr. Brown: That is a fact. Suppose the rod is out a distance of two and one-quarter or two and one-half inches in the clear, and constructed and located as you see the rod in the picture of engine 45, when a rod is constructed in that way, so it could be used as a grab-iron as you said, was it then ever customary to put in addition to that the grab-irons down below that?

A. It was not customary.

Q. But suppose that they don't have the pinlifting rod out that far, suppose it is not constructed so it could be used as a grab-iron, was too close or could not be used for that purpose, then what was it customary to have on the engine?

A. Grab-irons.

Q. Grab-irons?

A. Yes, sir.

Mr. Mytton: I did not get that last answer.

A. Grab-irons.

Recross-examination by Mr. Mytton:

Q. And then a great many of the engines in those days were equipped, though I think you said with these grab-irons, that were below the pin-lifting rod, and on either side of the coupler?

A. Some of them.

Q. And that furnished greater security to the man who was coupling or uncoupling, didn't it? That was the purpose of it, wasn't it? If it was not, what was the purpose of it?

A. I don't know just what you mean by that question.

Q. I want to know what was the purpose that on some
306 of the engines at that time they had those grab-irons into the beam, where they could be used close to the coupler, when a man was coupling or uncoupling. Wasn't it for the purpose of

affording to the employees greater security than any other contrivance than they had there?

A. I don't think so.

Q. What was the purpose of it then?

A. Just as a grab-iron.

Q. If he had all the security that he needed, what was the object of having this grab-iron so placed on either side then?

A. I don't think it was necessary.

Q. I did not ask you whether it was necessary. I asked what was its purpose there?

A. Simply a grab-iron.

Q. For what purpose, though?

A. Catching a hold of.

Q. Why? To give an employee greater security in coupling or uncoupling the cars, isn't that correct?

A. I don't think so.

Q. Well, why was it then? Why did you put them on there?

A. I was instructed to.

Q. Why? It was not a thing of beauty, of course, was it? It was a necessity, wasn't it?

A. I don't think so.

Q. What was the object of it, then, do you know?

A. As I say, to grab a hold of.

Q. To give the employee who was switching greater security from danger when he had to go inside and couple or uncouple a car, isn't that a fact?

A. Not from my opinion.

307 Q. Not from your point?

A. From my opinion.

Q. But that was the opinion of the people who instructed it to be done, wasn't it?

Mr. Brown: I object to what their opinion was.

The Court: Unless he knows.

Mr. Mytton: Or do you know anything about it?

The Court: Unless it shows that he knows something about that; the objection is sustained.

Q. Many times, Mr. McGoff, when a man on the end of the car would grab a hold of this pin-lifting rod, the lever of it, and it would not work, it might be necessary for him to go inside to fix the coupler with his hands, isn't that correct?

Mr. Brown: That is objected to, your Honor, as not proper in this case; whether it might be necessary for a man to go in there or not, would depend entirely on the rules of the company and the instructions of the company, whether it was the custom to go in there.

(Question read.) "Q. Many times, Mr. McGoff, when a man on the end of the car would grab a hold of this pin-lifting rod, the lever of it, and it would not work, it might be necessary for him

to go inside to fix the coupler with his hands, isn't that correct?" The practice and custom of employees many times, when a pin-lifting rod would not perform its function, that they would then go inside with their hands to fix the knuckle, isn't that correct?

Mr. Brown: That is objected to unless it is shown it was the practice and custom of the Grand Island road in violation of its rules and instructions.

308 The Court: Objection overruled.

To which action and ruling of the court the defendant at the time then and there duly excepted and still excepts.

Q. Will you please answer the question?

A. Just please put it again.

Q. I will do that, Mr. McGoff. (Question read.) "Q. The practice and custom of employees, many times, when a pin-lifting rod would not perform its function, that they would then go inside with their hands to fix the knuckle, isn't that correct?" You can answer that, yes or no?

A. Yes.

Q. Yes, that is right. Now then, when they would go in there to fix the knuckle, because the pin-lifting rod would not perform its function, and they would go in there behind the engine to fix this coupler with their hands, it afforded them greater security, when there was a grab-iron right close that they could hold on to with one hand and grip it, that is a fact, isn't it?

A. No, sir.

Q. And you say that the grab-iron on the side then would not afford them greater security?

A. No, sir.

Q. Great security?

A. No, sir.

Q. And that is what you tell these men?

A. Yes, sir.

Re-redirect examination by Mr. Brown:

Q. I wish you would explain why it would not afford greater security, Mr. McGoff?

A. In my opinion, it's lower and you would not have the leverage that you would by catching a hold of the uncoupling lever.

309 Mr. Mytton: And that is your sole reason, is it?

A. Yes, sir.

Witness dismissed.

The Court: Are there any other witnesses in the room that expect to testify in this case?

J. W. TWEDELL, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?
A. J. W. Twedell.
Q. What is your business, Mr. Twedell?
A. Car foreman for the Grand Island
Q. How long have you been car foreman for the Grand Island?
A. Nearly thirteen years.
310 Q. Do you know the general custom among railroads with respect to hand-holds or grab-irons or safety appliances of that character that were placed upon the rear end of their cars or tenders on June 9th, 1910, and prior thereto, before that time?
A. Yes, sir.
Q. I wish you would tell the jury what——
The Court: This custom should not be confined to one road. That is, what was the custom generally among railroad companies at that time, if you are acquainted with it?
A. Yes, sir.
The Court: Very well.
Q. I wish you would tell the jury what was customary at that time, Mr. Twedell?
A. Well, the custom was to provide a device, if it was an uncoupling lever, to uncouple the coupler from the cars—there was a device that run across the rear end of the tank to uncouple the coupler, and if it had a proper clearance, that acted also as a grab-iron on each side of the tank of the end sill or above the end sill.
Q. Now, what else would you have on, if anything, or was it customary to have on, I mean at the corners or anywhere else?
A. Oh, on the corners?
Q. Yes, sir.
A. On the corners we have what we call a sill step on each corner, which provides for a man stepping from the ground up to the step on the corners of the tank, and above the sills we have a vertical grab-iron, which runs up and down the corners of the tank for them to get on and off there.
311
Q. Was it customary to have a ladder anywhere upon the tender, and if so, where was that located?
A. There are ladders upon some engines. Some do not have them. Some of them have one in the center of the tank just above the coupler, and some of them have them to one side.
Q. Now, prior to June 10th, 1910, and at that time, and where the pin-lifting rod or uncoupling rod was used you say as a grab-iron, was it then customary to have any other kind of grab-irons upon the tenders at all, or cars, upon the ends, I mean?
A. Not where the uncoupling lever had the proper clearance.
Q. Are you familiar with engine 45?
A. Yes, sir.
Q. Were you familiar with it prior to the time of Mr. Moore's accident on June 10th, 1910?

A. Yes, sir; I was pretty familiar with it.

Q. I wish you would tell the jury whether or not the tender of that engine had upon it any uncoupling lever or rod which was also used as a grab-iron?

A. Yes, sir; it had that on it.

Q. While you were with the company and prior to the time of this accident, did you ever know or hear of anything being wrong with the coupling device upon the tender of engine 45?

Mr. Parkinson: That is objected to as hearsay, and as incompetent and immaterial.

The Court: Objection overruled.

312 Q. Did you ever have any knowledge of that kind from any source whatsoever, that it was defective or out of order in any way?

A. No, sir; I did not.

Cross-examination by Mr. Parkinson:

313 Q. Did you ever see a car in your life, not in your life, but prior to or on June 9th, 1910, did you ever see a car on your railroad or any other railroad that was not equipped
314 with an automatic coupler, a part of which is the pin-lifting rod, and also equipped with hand or grab-irons, did you ever see one that was not?

A. Yes, sir.

Q. Where?

A. I have seen them right under my own jurisdiction.

Q. You mean to say that you saw cars on your railroad that did not have those grab-irons on?

A. Yes, sir.

Q. Now, what class were they and what were they, just tell us about them?

A. Well, of course, I cannot remember any particular car, or any particular engine, but those we have got—these engines don't have that on.

Q. I am not asking you about an engine. Did I say anything about an engine? I said about a car? Did you understand it?

A. You said engines and cars, didn't you?

Q. I did not, no. Did you ever see a car?

A. I saw cars that didn't have a grab-iron down on the end sill; yes, sir.

Q. How many did you ever see at that time?

A. I have seen thousands of them.

Q. What roads do they operate on?

A. Operated on our railroad.

Q. You mean on your railroad? So there will be no mistake about that, the freight cars on your railroad on June 9th, 1910, when they had an automatic coupler on, did not also have the hand-hold or grab-irons on at that time?

A. Not on the end sill.

Q. Not on the end sill?

A. No, sir.

315 Q. Where did they have it?

A. Not more than thirty inches above the center line of the coupler.

Q. They have it up above the coupler?

A. Yes, sir.

Q. Thirty inches above the coupler?

A. I say not more than thirty inches.

Q. And they were not on the end sill at all?

A. No, sir; lots of them were not.

Q. Did you ever see them on the cars of any other railroad than your own?

A. I have seen them on lots of cars.

Q. Did you ever switch any or brake any?

A. No, sir; I never switched any.

Q. Did you ever handle the cars out in operation?

A. Not in the yards; no, sir.

Q. Not out in the yards?

A. No, sir.

Q. And now, so there will be no mistake about it, I want to know what a grab-iron and a hand-hold is, and I hand you a picture which I ask the stenographer to mark Plaintiff's Exhibit "G," and I mark with my pencil a grab-iron. I ask you where I have placed the cross mark on the right hand side to tell the jury what that iron is that I show you? (Handing witness a photograph.)

A. That is to be used as a grab-iron.

Q. For the greater security of men in coupling and uncoupling cars?

A. Yes, sir; for them to grab hold of.

Q. And that was the purpose of that, of putting it on, for the greater security of men to couple and uncouple cars?

316 A. Yes, sir; that is what it is put there for.

Q. There is not any other purpose that it is put there for?

A. No, sir.

Q. That is the only purpose that that iron was put there for?

A. Yes, sir.

Q. That is the character of an engine that had on the grab-irons? That is the character of the grab-irons they had on them?

A. That is one of the characters.

Q. That is one of the characters?

A. Yes, sir.

Q. And that is the place they were placed on the sill beam, is it not?

A. No, sir; they were not all placed there.

Q. That is the customary place?

A. Not any more so than any other place. You can put them wherever you please.

Q. I know, but I am asking you if that was the customary place?

A. That is the custom on some engines.

Q. On some engines? That was the customary place at that time

of putting them on the engine when the engine had them on, was it not?

A. Where the engines have them on?

Q. Yes, where the tenders have them on?

A. There are some of them put there; yes sir.

Q. At that time? And that is a grab-iron? I want the jury to understand, that is what you call a grab-iron, isn't it?

A. That is a grab-iron.

Q. That is a grab-iron?

A. Yes, sir.

317 Q. And that is a correct representation of the kind of a grab-iron they had at that time?

A. That was one of the kinds.

Q. Now, I hand you a picture, Plaintiff's Exhibit "H," and I mark on it with a cross mark a grab-iron or a certain iron, what do you call that iron? (Handing witness a photograph.)

A. That is a grab-iron.

Q. That is a grab-iron?

A. Yes, sir.

Q. And that is placed there for the greater security of men in coupling and uncoupling cars, is it not?

A. Yes, sir.

Q. And no other purpose?

A. No other purpose.

Q. No other purpose?

A. No, sir.

Q. That is the kind of a hand-hold or grab-iron that they had at that time on the engines which were equipped with grab-irons, is it not?

A. That is one of the kinds that we used.

Q. That is one of the kinds that you used?

A. Yes, sir.

Q. That is on the same class of engine and everything you used it, and that is the place they were put on, is it not?

A. Well, they might not have all been put on that particular place.

Q. I know that they might not, but that was the customary place of putting them?

A. Nearly so.

Q. Nearly so? It does not vary more than an inch or so?

A. Yes, it could vary; it could be put on differently.

318 Q. I am talking about the customary way of putting them on? If they moved them anywheres else——

A. They could have moved it down here.

Q. Not what they could, where was the customary place?

A. That was one of the customary places.

Q. That is about the customary place?

A. That is about the customary place.

Q. At that time?

A. Yes, sir.

Q. At that time, that is right, and that is a very accurate and good illustration of it, is it not?

A. Yes, sir; but they didn't have all of them on it.

Q. I understand that. But that is a very accurate and good illustration of the hand-bolds and what you call a hand-hold, and the place it was put on the tenders of the engine of the tenders that had them on, wasn't it, at that time?

A. Yes; the ones that had them on; yes, sir.

Q. Of the ones that had them on, yes, at that time. Now, some of those engines, the pin-lifting rods were not clear, they were so close that they could be used as a grab-iron, and some of them were further out, is that right?

A. I would not say whether any of the engines did not have the proper clearance or not.

Q. Well, the only time you put grab-irons on was when they didn't have the proper clearance?

A. That is correct.

Q. And so some of the engines did not have the proper clearance?

A. Might have had.

Q. Might have had?

A. No, sir.

319 Q. You don't have any recollection on any particular engine of how far they were out or not?

A. I could not give you anything independent on any one engine.

Q. On engine 45 or any other engine?

A. No, sir.

Q. Could not help us in that respect? You could not tell us whether the pin-lifting rod was so close it could not be used for a grab-iron or not? You have no independent recollection on that subject?

A. I have no independent recollection; no, sir.

Redirect examination by Mr. Brown:

Q. Mr. Twedell, in railroad parlance or the language used among the railroads in designating certain appliances, I wish you would tell the jury what they term or what they call a grab-iron, what may be a grab-iron, if anything, and where you get that from?

A. Well, a grab-iron is a device or an instrument attached to the car or engine that a man can grab a hold of. It does not necessarily have to be any one particular thing; it could be a lift rod, an uncoupling lever; it could be a part of the brake shaft, if it had the proper clearance around it, or any device that might be put on there for that purpose, or could be used for that purpose. It don't necessarily need to be of any size and just so it meets the requirements.

Q. Do you know whether or not there is anything in the rules of the car builders' association, which designates or specifies the pin-lifting rod or an uncoupling device as a grab-iron?

A. Yes, sir.

Mr. Parkinson: I want to object to that. We object to that
320 as incompetent, anything about any Master Car Builders' Association—it is not binding or it is not the law.

Mr. Brown: It shows the custom among the railroads.

Mr. Perkinson: No, you did not ask for the custom; you asked for the custom of the Car Builders' Association.

The Court: Objection sustained.

Mr. Brown: I will ask you what is the Car Builders' Association?

Mr. Parkinson: We object to that, your Honor; that is irrelevant, we cannot try that issue and we are not prepared to go out and meet that.

Mr. Brown: We want to lay the foundation for the question.

The Court: Objection overruled.

Q. What is the Car Builders' Association?

A. The Car Builders' Association—it is the representatives of the different roads throughout the country.

Q. Now, does the Car Builders' Association promulgate rules or regulations designating what may be used or may be considered as a grab-iron or a hand-hold, or anything of that kind?

Mr. Parkinson: We object to that. Just a minute. I ask the privilege of objecting.

The Witness: Excuse me, Mr. Parkinson.

Mr. Parkinson: It is proper to answer unless I do. The Car Builders' Association is not a legislative body, has no power to
321 determine what shall or shall not be used on a car, nor to determine what is a compliance with the law, and we object to any evidence on that for that purpose.

The Court: Objection overruled.

Q. Have you the rules and regulations of the Car Builders' Association with you there, Mr. Twedell?

A. Yes, sir.

Q. Would you turn to the part of it that refers to grab-irons or anything of that character—find it there, if you please. I will ask you if these rules or regulations of the Master Car Builders' Association are promulgated generally among all rail-road companies in the country?

A. Yes, sir.

Mr. Brown: I desire to offer in evidence, your Honor, Section 4, beginning on page 717 and ending on page 718, and a portion of Section 7 on page 718, of the part indicated in red pencil marks, and that part of Section 18 on page 719, indicated by the red pencil marks, and that portion of Section 401, page 721, indicated by red pencil marks, and Sections 7 and 8 on page 722.

The Court: Submit it to the other side.

Mr. Parkinson: I think the whole part ought to be in. It shows and defines what a hand-hold is.

The Court: You can put in the rest of it.

322 Mr. Parkinson: We think the offer ought to be of the whole thing to show the meaning of the context, what they are talking about. We think the whole section shows what it refers to.

Mr. Brown: I don't object if they want it in.

Mr. Parkinson: If it goes in at all, the whole section ought to go in. What he is introducing is a little extract that does not determine what it is talking about.

Mr. Brown: With that statement of theirs, I will introduce it all, then.

(Reading.) "(4) Each end of car to be provided with two horizontal hand-holds, not less than twelve inches, and preferably sixteen inches in the clear, or longer, located not over thirty inches above center line of coupler, or placed under the end sill as near the face as will insure a good, safe fastening, or, if preferred, may be placed on the face of end sill. The coupler unlocking rod, the tread of the ladder or any suitably located part of the car which does not exceed two inches on each side or in diameter, and has the proper clearance, will be considered a suitable end hand-hold."

The Court: Now, about this book, probably I had better state out of the hearing of the jury. These sections or parts of sections just introduced in the book use the word "suitable hand-holds" and the jury might conclude that determined for them the question of the sufficiency of these hand-holds, and I think it ought to be defined in some way to the jury or explained to them that suitable here simply means satisfactory to this association in the construction of cars, and is not intended to preclude the jury or to bind the jury in
323 regard to what they think in this case.

Mr. Brown: That should be given, I think, to the jury verbally, and I think an instruction should cover that also, because that is the only purpose, as I stated in the record for which it was used, and it should not be binding on the jury as to what the law was.

(Reading.) "The coupler unlocking rod, or any suitably located part of the car which does not exceed two inches on each side or in diameter, and has the proper clearance, will be considered a suitable end hand-hold." "The coupler unlocking rod, when properly located and having proper clearance allowed is a suitable end hand-hold."

323½ W. C. SMITH, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name?
A. W. C. Smith.
Q. Where do you live, Mr. Smith?
A. Kansas City, Missouri.
Q. In what business are you engaged in Kansas City, Missouri?
A. Master Mechanic of the Missouri Pacific Railway.
324 Q. Prior to June 9th, 1910, I wish you would tell the jury what it was usual and customary for railroad companies to do with respect to equipping the rear end of their tenders with hand-holds or grab-irons or appliances used for that purpose, tell what they did in that respect, and what appliances they used for that purpose.

The Court: Your answer should not be confined to one road,

merely, Mr. Smith. Are you acquainted with this custom among railroads generally at that time?

A. In a general way, yes, sir; and in particularly on our own road.

Q. Just proceed to tell, please.

A. The locomotive tender, the rear end of locomotive tenders, prior to the time mentioned, equipped with an uncoupling lever extending across the back end sill, the handles of which came within about nine or ten inches of each end of the sill, and that uncoupling rod was so constructed as to have a clearance of not less than two and one-half inches at any point along the rod, except where the bracket itself filled it up, and that was considered an uncoupling rod, and a grab iron, and answered all the purposes that a grab-iron would answer.

Q. In addition to that, did they have any grab-irons near the corners or parts of the tender?

325 A. They had two vertical grab-irons extending, varying in length, but as a rule about the clear length of the height of the tank, nearly the clear length of the height of the tank, on the corners of the tank, the reservoir.

326 Cross-examination by Mr. Parkinson:

Q. You don't mean to tell this jury that prior to June 9th, 1910, that engines were not equipped with hand-holds similar to the one I hand you in Plaintiff's Exhibit "H," indicated by the cross mark, do you? (Handing witness a photograph.)

A. I do, yes, sir.

Q. Do you mean to say that you never heard of an engine having a hand-hold like that prior to that time?

A. No, sir.

Q. Never heard of it?

A. No, sir. Well, I don't mean to say that.

Q. What do you mean to say?

A. I mean to say that as a general practice, the engines were not equipped with grab-irons as shown there.

Q. But a great many of them were?

A. I could not say as to that.

Q. A great many of them? You mean it was not a general practice on the engines that you saw, but some of them had those on, is that the idea?

A. Yes, sir.

Q. You remember of seeing them equipped with these, didn't you?

A. Yes, sir.

Q. But as to what number of them were equipped with these and what number of them were not equipped with them, you could not estimate?

A. No, sir.

327 Q. That was on your road and the other roads you have been talking about?

A. Yes, sir.

Q. That in June, 1910, were equipped with these grab-irons that I have indicated on Plaintiff's Exhibit "H," marked X?

A. Yes, sir.

Q. Now, those tenders and those engines equipped with those grab-irons that were customarily placed upon the engine at the point I have indicated in the picture, were they not?

A. Not always.

Q. Well, was that the customary place of putting them?

A. Not always.

Q. Was that the customary place of putting them?

A. Not always.

Q. I did not ask you if it was always. I asked you if that was the customary place?

A. I said not always the customary place.

Q. Where was the customary place?

A. Sometimes they are placed on top of the sill; sometimes they were placed under the sill; sometimes on the back of the tank.

Q. Sometimes underneath the sill?

A. Yes, sir.

Q. Down underneath the sill on the back end?

A. Yes, sir.

Q. And sometimes on top of the sill?

A. Yes, sir.

Q. And sometimes around where——

A. Sometimes on the——

Q. Upon the iron part of the engine?

A. Yes, sir.

328 & 329 Q. You have seen them in all those places, have you?

A. Yes, sir.

Q. A great many of them on all of those places?

A. No, sir.

Q. But when they were placed there, that was the kind of a grab-iron they had that I have indicated on that picture, wasn't it?

A. Something similar to that.

Q. Very similar to that, wasn't it?

A. Something similar to that.

330 Q. Before you went on the stand you talked with the representative here of the railroad and discussed your evidence?

A. Yes, sir.

Q. And you came, I believe, on a pass, is that true?

A. I came up on the Grand Island, sir, on a pass issued by the Grand Island.

Witness dismissed.

CHARLES EDWARD HEDRIX, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please.

A. Charles Edward Hedrix.

Q. What is your business, Mr. Hedrix?

A. I am in the railroad business as superintendent of the Grand Island.

Q. How long have you worked for the Grand Island Company?

A. Twenty-four years.

Q. In what capacity have you worked, starting from the beginning, Mr. Hedrix?

A. I started in with them as a brakeman in 1888.

Q. As a what?

A. As a brakeman in 1888. I worked continuously in the train service as conductor and brakeman for the amount of fourteen years, and then I came into the office, and I have been there train-master and assistant superintendent and superintendent for the past eighteen years.

Q. Mr. Hedrix, as superintendent of the Grand Island Company, what are your duties in a general way?

331 A. I have charge of the transportation affairs, the upkeep of the track, cars and machinery.

Q. Are you familiar with an engine owned by the Grand Island Company, and known as engine 45?

A. Yes, sir.

Q. Were you in the City of St. Joseph the date that Mr. Moore was injured at Marysville, Kansas?

A. No. I was not in the city. I was in Kansas City, I think; I am not certain.

Q. You were in Kansas City at that time?

A. Yes, sir.

Q. How soon after that time did you see engine 45, if you know?

A. I saw engine 45 on June 10th.

Q. You saw engine 45 on June 10th?

A. Yes, sir.

Q. Did you make an inspection of the engine yourself, Mr. Hedrix?

A. I made a very careful inspection of the engine.

Q. I wish you would state whether or not there was any evidence of any work having been done upon the rear end of the tender of any kind or character?

A. There was not only no evidence, but I satisfied myself there had not been by inquiry amongst the men.

Mr. Parkinson: We ask that to be stricken out as an attempt by this witness, trying to put something else in the record that he has no right to, his opinion about having satisfied himself. That is highly improper and he understands that.

The Court: Yes, sir; that will be stricken out.

Mr. Brown: That is proper to strike that out, what he
332 found out from other people. From the inspection you made yourself, tell the jury whether there had been anything done with the coupling device or rod or anything of that kind?

A. No, sir; there had been no changes made.

Q. I wish you would tell the jury in what condition the coupling device was at the time you made the inspection?

A. It was in as nearly as perfect condition as it would be possible to have it.

Q. Did you attempt to operate the lever, the pin-lifting lever?

A. I tried the uncoupling device, and closed the knuckle and uncoupled it repeatedly in every different position that it would be possible for it to be in.

Q. At that time and prior to the time of the accident, Mr. Hedrix, what safety devices did this tender have upon the rear end of it, if any, that is, in the nature of hand-holds or grab-irons?

A. Each corner of the tank had a vertical hand-hold extending the full length of the tank; there were sill steps, and across the entire end of the tank on top of the bumper beam, the lifter rod was so constructed as to form a hand-hold.

Q. Do you know what the custom was among railroad companies at that time, Mr. Hedrix, with respect to equipping the rear ends of their tenders with hand-holds or grab-irons?

A. Yes, sir.

Q. I wish you would tell the jury what the custom was at that time.

A. The engines were all equipped with the lift lever rod, when possible and the construction of the tank would admit that the uncoupling rod was so arranged that it furnished the grab-iron facility; when the tanks were not so constructed, some of them being
333 all steel or all iron, entirely iron, it was not possible to put the uncoupling lever on excepting making it so close to the edge of the tank that it was not possible to grasp it, in that event it was not unusual and regular in fact to put on a short grab-iron—it might extend diagonally across the end of the frame, or it might be upon the water tank portion of the car, but it would always be within thirty inches of the line of the grab-iron.

334 Q. Are you acquainted with Ralph Moore, the plaintiff in this case?

A. I know him quite well.

Q. How long have you known him, Mr. Hedrix?

A. Ever since he was employed by the Grand Island.

Q. Who employed him?

A. He was employed by my office at my office by my chief clerk, Mr. Tansell. I saw him, I think, at the time, but I did not have any particular conversation with him that I recall of at that time.

Q. How soon after the accident did you see Mr. Moore, Mr. Hedrix?

A. I don't recall the exact date, but it was very soon after the accident, within a week, I would judge.

Q. And tell the jury how it happened you called to see him, whether frequent or otherwise, during the time he was in the hospital and incapacitated?

A. I went up to see him several times; I don't remember how many. Some question came up about his insurance; in fact I was either told or word was sent to me that he had lost his identification card in the insurance company, and requested that I write the insurance company about it. I don't recall that was an individual

request made by him to me direct, or indirectly through
335 someone else, but at any rate I started from that and had some more or less relation with him regarding his insurance, and then I called on him individually after that was settled several times and saw him.

Q. Did you ever at any time undertake to quiz Mr. Moore to ascertain anything about his troubles yourself, personally?

A. No, sir.

Q. Were you ever present, Mr. Hedrix, when anyone else asked Mr. Moore how he happened to be injured?

A. Yes, I was present at the time that the insurance adjuster visited Mr. Moore and paid him his insurance and at that time——

Q. Who was that adjuster, Mr. Hedrix?

A. That was Mr. Donan.

Q. What insurance company was that?

A. Continental Casualty Company.

Q. Had that anything whatever to do with the Grand Island Railway Company, any connection of any kind or character further than insuring employes?

A. None whatever.

Q. How did you happen to go to the hospital with Mr. Donan at that time?

A. Well, as I stated, I had written the insurance company that Mr. Moore had lost his identification card, and told them that he had been injured.

Q. Never mind telling what you said, Mr. Hedrix. Just that circumstance is sufficient.

A. I had written them that he had been injured. Mr. Donan came to my office first to see as to the payment of certain premiums that was due on the insurance being deducted from Mr. Moore's wages.

336 Mr. Parkinson: We object to what took place down there, your Honor.

The Court: Yes, you need not tell what you and the insurance man did. You are merely telling now how you came to go up there.

Q. Why did you go to the hospital?

A. I went up to the hospital after talking with Mr. Donan about the insurance to introduce him to Mr. Moore, and show him where the place was. I volunteered to go up there with him.

Q. Did you hear any conversation between Mr. Donan and Mr. Moore at that time with respect to how Mr. Moore claimed he was injured, and if so, I wish you would tell the circumstances of the conversation, and what was said?

A. I was present all the time. Mr. Donan asked a number of questions leading up to the way the insurance had been paid for: in fact there was some money yet due, and finally asked Mr. Moore how he got injured, and in reply to that Mr. Moore stated that he did not know.



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 3

Q. Did you hear him say anything further as to what he did, what the engine was doing?

A. He stated that the engine was backing up, and he went in behind it.

Q. Did he say what for or anything of that kind, Mr. Hedrix?

A. I don't recall that he did or did not particularly about that.

Q. Did he say anything about how he happened to trip or fell or anything of that kind?

A. No; Mr. Donan asked him about that and he said he did not know, that things were coming too fast for him, if I remember, his exact words, I believe that was what he said.

337 Cross-examination by Mr. Mytton:

Q. You were there all the time Donan was about there?

A. Yes.

Q. What was that he said?

A. Mr. Donan asked him how he got hurt.

Q. And he said he didn't know?

A. He did not know.

Q. He asked him how he got hurt?

A. Yes, sir.

338 Q. And Moore said "I don't know"?

A. I do not know.

Q. The boy was laying in bed at that time, was he not?

A. Yes, sir.

Q. And what was the next thing that he said to him?

A. Oh, I would not undertake to repeat the conversation verbatim in the exact——

Q. That was all that was said by Moore to Donan as to how he got hurt, he did not know?

A. No, he stated also that he had went in behind the tank, they were backing in there, and he went in behind the tank.

Q. Went in behind the tank as they were backing down?

A. Yes, sir.

Q. Anything else that he said?

A. Yes; on further inquiry from Mr. Donan he stated that he did not know how he come to fall, they were coming too fast for him. I think that is his exact words.

Q. They were coming too fast for him?

A. Yes, sir.

Q. Now did he state anything else?

A. Not regarding the method of how he got hurt.

Q. Nothing? That is all that was said?

A. As far as I recall in a general way; he talked about other matters.

Q. I know, about other matters. Was there anything else that Moore said during the three or four hours that you were there and Donan was there in connection with how he got hurt, except what you have just stated?

A. I think I have stated it all.

Q. That is, he did not know? Afterwards, that

—. ——.

339 Q. Was this filled in by you in your own hand writing?
A. Yes, all my handwriting.
Q. All in your handwriting?
A. Yes, sir.
Q. And how long was this paper in your possession there, do you know how long you had it there before it was finally turned in to the insurance company?
A. No, I did not have the paper but a matter of a very short time. The paper was brought from the hospital and from there after I filled out the blank and gave my affidavit to it, it was taken then by some one of the clerks to Hiawatha, where Mr. Pigg filled out his affidavit, and from there mailed direct to the insurance company. I never saw the paper again.
Q. Was your statement made out first or was the statement of Mr. Moore, the plaintiff in the case, made out first, do you know?
A. I am under the impression that mine was made first.
Q. Under the impression yours was made first?
A. But originally it was not sworn to first, however.
Q. You think you filled out your blank first?
A. I think I did.
Q. Have you any recollection, Mr. Hedrix, at this time of any kind or character about changing this?
A. No; I don't know just why it was changed more than the necessary information should correspond there—the information we had on the subject.
Q. And at the time that you filled this out, how had you gotten your information, any information you may have had?
A. From the original papers and inquiries I had made in a general way as to the cause of the accident.

340 N. S. ERHART, called as a witness on the part of the defendant first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. Will you state your name, please, Mr. Erhart?
A. N. S. Erhart.
Q. Where do you live?
A. Trenton, Missouri.
Q. At Trenton, Missouri?
A. Yes, sir.
Q. How long have you lived at Trenton?
A. Three years.
Q. What is your business?
A. I am general foreman of the Rock Island shops at
341 Trenton.
Q. General foreman of the Rock Island Shops?
A. Yes, sir.
Q. How long have you been a railroad man?
A. About sixteen years.

Q. And in what capacity have you been employed during your experience as a railroad man?

A. As a mechanic and machinist.

Q. As a mechanic and a machinist?

A. Yes, sir.

Q. And with what railroad companies?

A. Why, The Southern Pacific and the Rock Island at Trenton.

Q. Prior to June 9th, 1910, and on that date, that is, up to that time, do you know the character of safety appliances and devices which were placed upon the rear end of tenders by railroad companies generally, that is, known as hand-holds or grab-irons?

A. Why, yes, sir.

Q. And what was the character of those appliances prior to and up to the time of June 9th, 1910, just describe them in a general way to the jury?

A. Why, the grab-iron on the rear of the tank is practically the same with the exception of the grab-iron on the back end sill; that has been added to the present time.

Q. Well, I mean prior to the time of June, 10th, 1910, before that time and up to that time?

A. Well, the iron was practically the same; that is, the iron on the rear of the tank, the lifter rod.

Q. You call it the pin-lifting rod?

A. Yes, sir; the pin-lifting rod.

Q. And was there anything at the corners of the tender
342 or anything of that kind?

A. Not any more than there are at the present time.

Q. I mean what were there at that time?

A. Well, there was the iron on the end of the tank; at that time was a column with a pipe on it—at the present time they are supposed to be——

Q. No, never mind the present time. I am talking about that time. Just the time before the change was made under any law or anything of that kind,—tell the jury whether or not tenders were usually equipped and generally equipped in that way at the time that I have stated?

A. Yes, sir; they were.

Q. I wish you would look at the photograph marked Defendant's Exhibit 5, and tell the jury what the rod extending across the rear end of that tender is, and by what name it is known?

A. It is the pin lifter rod.

Q. Is that the rod you referred to about being used as a grab-iron or hand-hold?

A. Yes, sir.

Q. Do you know whether or not at that time and prior to that time railroad companies used their engines or numbers of their engines interchangeably for freight and passenger traffic?

A. Yes, sir; they did.

Q. And in case they did that, how did they have their engines equipped with respect to a steam hose?

A. Why, they had just the steam hose connection there from the

rear of the tank, and they had a chain that coupled the hose up to the tank.

Q. Now what was the object of doing that, and was that done in all cases, and in what case?

A. It was done in cases so that the steam hose would not be torn off across road crossings.

343 Q. Suppose the hose did not reach the ground—or was there any difference in the construction of tenders, was some higher than others?

A. Yes, sir.

Q. In case the hose did not reach the ground, and there was no danger of it tearing or dragging off, did they hook them up or not?

A. No, as a rule they let them go.

Cross-examination by Mr. Mytton:

Q. Mr. Erhart, do you mean to state that the customary way of holding up the steam hose at that time was by virtue of a chain tied to it?

A. Yes, sir; in case an engine crossing a road crossing,—yes, sir.

Q. At that time?

A. Well, not in all cases it was not.

Q. Customarily in most?

A. Yes, sir; not in all cases.

Q. No, not in all cases, but in most cases it was customary to have a chain that would connect down and hold up the steam hose?

A. Yes, sir.

Q. At that time, that was 1910?

A. Yes, sir.

Q. Now these two rods that extend perpendicular on the sides and on the end of the tank those are called——

A. Grab-irons.

Q. Or hand-holds?

A. Yes, sir.

Q. And are used by men who stand upon the stirrup and step to hold on to?

A. Yes, sir.

Q. How?

A. Yes, sir.

Q. And this is the stirrup or step that a man stands upon

344 on each side, is that correct?

A. Yes, sir.

Q. And this long iron bar that goes along here, that is the pin-lifting rod, isn't it?

A. Yes, sir?

Q. And these iron portions of that rod which extend perpendicular, that is called the lever—would you call it, and the pin-lifting rod?

A. It is the pinlifter rod, yes, sir.

Q. And it is manipulated by lifting up or down or working it, is that correct?

A. Yes, sir.

Q. Now, what is the correct name for these two pieces of iron that are in the beam right to the side of the coupler? (Indicating.)
A. They are grab-irons.
Q. Those are grab-irons?
A. Yes, sir.
Q. Now did you ever see engines prior to that time with these grab-irons on the end there?
A. I don't remember if we had any in the Rock Island.
Q. Did you ever see any on any railroad?
A. Not that I can remember of.
Q. Not that you can remember of?
A. No, sir.
Q. When was the first time you ever remember of seeing grab-irons in the end there?
A. Well, last year was the first we began putting them on.
Q. That was the first time?
A. Yes, sir.
Q. And you never saw them on any railroad until last year?
A. No, sir; not that I can remember of.
Q. Now for men who are coupling or uncoupling a car, what is the object of putting these on the beam there?
A. Well, the last year it was a law.
345 Q. What do you mean, that it was the law?
A. To put those grab-irons on.

Mr. Brown: That is objected to, in the last year, your Honor.
The Court: Yes.

Q. What I want to know is, what was the object of those things, what was the purpose of those things there?
A. So a man can take hold of them, I suppose.
Q. But for what purpose does he take hold of them there?
A. To keep him off of the track.
Q. Because they are of greater security to him when he is coupling or uncoupling, isn't that true?
A. Yes, sir.
Q. In other words, they are of greater security to him than anyone else, and that is why they are putting them on?
Mr. Brown: What was your answer to the last question?
A. The last one, I said, yes, sir.

Witness dismissed.

WILLIAM N. PURVIS, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?
A. William N. Purvis.
Q. Mr. Purvis, what is your business?
A. Chief clerk to the general manager of the Grand
346 Island.
Q. Mr. Purvis, did you go to the St. Joseph hospital on or about the 28th day of June, 1910?

A. Yes, sir.
Q. And take an affidavit of Mr. Ralph Moore?
A. Yes, sir.
Q. Who wrote out the affidavit, Mr. Purvis?
A. Mr. Tansell wrote it out.
Q. Mr. Tansell wrote it out?
A. Yes, sir.
Q. And who swore Mr. Moore to it?
A. I did.
Q. How was Mr. Moore's signature made to the paper?
A. He touched the end of the pen with the stub of his arm, and Mr. Tansell signed it.
Q. I wish you would tell the jury just how you proceeded there, how the questions were answered, what questions you asked and how the answers were taken and so forth, or how you did it?
A. Mr. Tansell first gave him the affidavit and let him read it over himself; then he asked the questions, and Mr. Moore
347 made the answers, and Mr. Tansell wrote them down just the way he answered them.
Q. Now after it was all written out do you know whether or not it was read over to Mr. Moore, or whether he read it over or not?
A. Yes, sir; he read it over.
Q. And did you then swear him to the paper?
A. Yes, sir.
Q. I wish you would look at the paper that I hand you, Mr. Purvis, marked defendant's Exhibit Number 4, and tell the jury if that is the paper, that is the first page of the paper there—see if that is the paper that you took the acknowledg...
A. Yes, sir; that is the original paper.
Q. Did you ask Mr. Moore any further questions than merely the questions for the purpose of putting the answers in here?
A. No, I did not ask him any questions; the questions were read by Mr. Tansell and he wrote them down.

348 Mr. Brown: I desire to offer in evidence the statement made by Mr. Pigg at the time the accident occurred, your Honor.
349 Mr. Mytton: No objection, your Honor.
"Said paper marked Defendant's Exhibit 6, and is as follows:

The St. Joseph & Grand Island Railway Company Report of Personal Injury to Employe-, Passengers or Other Persons.

Date of accident—June 9th, 1910.
Time it occurred—9:15 A. M.
Place—Marysville Yards.
...trict—First—Division.
No. of Train, Section or Gang—Tr. 14.
Name of Conductor, Yardmaster or Foreman—R. Pigg, Cond'r.
No. of engine—45.

Name of engineer—Hawkins.
Speed of train at time of accident—3 miles per hour.
State of weather and condition of atmosphere—Clear.
Name of person injured—R. W. Moore.
Passenger or employe—Employe.
Occupation, if employe—Brakeman.
Destination, if passenger—(Left blank).
Residence or P. O. Address—St. Joseph, Missouri.
Probable age—23.
Married or single—Single.
What family, if any—Mother.
Name and address of nearest living relative—St. Joseph, Mo.
Condition of life or circumstances—Both hands cut off, leg broken.
If an employe, give date when last entered Company's service:—7:30 A. M. 6-9-10.
350 If injured in coupling, was coupling stick used—Was not.
Where and in whose charge was injured person left?—Dr. J. L. Hausman.
Name of attending physician, if any—Dr. J. L. Hausman and R. Kawkins.

Eye Witnesses to the Injury.

(Give names, occupation, if employes, and addresses.)

G. G. Miller, Section Foreman.
R. Pigg, Conductor.

Narrative Report.—State fully nature and extent of injury and how it occurred with writer's opinion as to responsibility and reasons for such opinion:

Was backing through cross over switch just west of depot at Marysville; Brakeman R. W. Moore throwed the switch and got on step on back end of tank, pulled on the lift lever to open knuckle—then jumped off, run between the tracks trying to open knuckle, stumbled over rail and fell—tank run over him; got Eng. stopped as back driver caught him cutting both hands off—and breaking left leg. Eng. went about 25 or 30 feet after I hollowed. Impossible to stop any sooner.

(Signed by) R. PIGG,
(Title) *Conductor.*

(Dated) June 9th, 1910.

"Marked Defendant's Exhibit 6, by F. J. Stever."

RUFUS B. TANSELL, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

351 Direct examination by Mr. Brown:

Q. And how soon after, if you know?
A. It was not over a day after; possibly it might have been the same day; that is too long ago for me to remember definitely.
Q. But you say you don't recall any of the circumstances as to why it was erased?
A. No, sir.

Cross-examination by Mr. Mytton:

Q. So you don't know of your own knowledge why Mr. Hedrix changed it, do you?
A. No, sir; I do not.
Q. Now at this time you were connected with the claim department of the Grand Island Railway Company?
A. Yes, sir.
Q. In the claim department's office?
A. Yes, sir; and in the operating department.
Q. And in the claim department?
A. Yes, sir.
Q. And who was the claim agent of the Grand Island at that time?
A. Mr. M. A. Hartigan.
Q. And how long had you been connected with the claim department?
A. About a year and a half at that time.
Q. And you knew at that time that Mr. Moore was very badly injured, didn't you?
A. Yes, sir.
Q. And you now went up there while you were still the claim agent knowing that there might possibly be a controversy about those matters just solely and for the only purpose of getting the insurance?
A. I don't quite understand your question, Mr. Mytton.
Q. Will you read it to him, please? (Question read.)

352 J. J. ACKER, called as a witness in the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?
A. J. J. Acker.
Q. Where do you live, Mr. Acker?
A. Horton, Kansas.
353 Q. At Horton?
A. Yes, sir.
Q. How long have you lived there?
A. Fourteen years.
Q. What is your business?

A. General car foreman.
Q. For what company?
A. Rock Island.
Q. How long have you been the general car foreman for the Rock Island?
A. About twelve years.
Q. And how long have you been a railroad man?
A. It will be twenty years next August 1st.
Q. Has your company any affiliation or any relations of any kind with the Grand Island Company, are they interested together, in any way?
A. Not that I know of.
Q. Prior to June 9th, 1910, and up to that time, do you know what the general custom of railroad companies was with respect to furnishing hand-holds or grab-irons upon the rear ends of their tenders?
A. The general custom on all roads was that if the pin lifter was of sufficient clearance that it was an effective grab.
Q. Was that used as a hand-hold or grab-iron?
A. Yes, sir.
Q. In addition to that did you have anything at the corners of the tender?
A. Yes, sir.

354 Cross-examination by Mr. Parkinson:

Q. I show you a picture marked Plaintiff's Exhibit H, and on it an iron with a cross mark on it, what do you call that iron?
A. That is a grab-iron.
Q. That is a grab-iron?
A. Yes, sir.
Q. And is that the customary place of putting a grab-iron, where tenders have them on, is that customary place?
A. Not necessarily.
Q. Where is the customary place?
A. Liable to be on the bottom or on the top.
Q. They put them on all of those places, you think?
A. Yes, sir.
Q. Now you say that at the time in June, 1910, they fre-
355 quently had these grab-irons on the engines, on the tenders of the engines?
A. They had them in some cases.
Q. Well, they frequently had them?
A. In some cases.
Q. That is twice you have said that. Now will you answer my question: Did they frequently have them?
A. Well, yes.
Q. That is right. And what was the purpose of that grab-iron? What purpose does it serve? Just tell the jury whether or not that was put there for the greater security of men in coupling and uncoupling cars?

A. Not necessarily as long as the pin lifter had sufficient clearance.

Q. I did not ask you that. I said, what was the purpose that was put there for, was it there for the greater security of men in coupling and uncoupling cars? Was that the purpose in putting it there?

A. Yes, sir.

Q. That is right. That was the only purpose they had in putting it there, wasn't it? Now if you know of any other purpose that they had, just tell the jury, that they had at this time? Any other purpose they had in putting it there except for the greater security of men in coupling and uncoupling cars, just tell the jury at this time? Well, you have had about while I could count fifty or sixty, can you still think of but the one purpose, for the security of men in coupling and uncoupling the cars? Take your time, of course. I will ask you again if you can study up any possible reason of having that grab-iron except for the greater security of men in coupling and uncoupling cars? Take time to study, Mr. Acker.

A. It was only in some cases where they had the grab-irons on, it was not a regular custom.

356 Q. You said that three or four times. I am asking you now if you can tell the jury any other purpose in putting it on except that purpose, and you can take your time to study up any reason, now except the one purpose, and if you can think of any other reason, tell this jury at this time, except that one purpose?

A. It was put on there for a grab handle, those that had them.

Q. Those that had them were put on for a grab-iron, and for the greater security of men in coupling and uncoupling cars? That was the purpose in putting them on, wasn't it? Will you please answer the question?

A. Why, I think they were.

Q. And that was the only purpose they put them on for, wasn't it? Will you please answer the question?

A. I have answered that one.

Q. That was the only purpose I say that they put them on for?

A. They were put on there for a grab handle.

Q. For the greater security of men in coupling and uncoupling cars?

A. I don't know that part of it.

Q. Why, you said so a moment ago, didn't you?

A. It was a grab handle I said.

Q. And you said that the purpose of it was for the security of men in coupling and uncoupling cars?

A. I did not say that.

Q. Tell the jury what purpose it was put on there for?

A. It was put on there for a grab handle in case a pin lifter did not have sufficient clearance to make a grab—to make an effective grab.

357 Q. So it was put on, the purpose of putting it on was for the greater security of the men in coupling and uncoupling cars, wasn't it?

A. Yes, sir; where the pin lifter did not have sufficient clearance.
Q. You know the only purpose in putting it on there was for the greater security of men in coupling and uncoupling cars?
A. Yes, sir; in case the pin lifter did not have sufficient clearance.
Q. You know that most of the engines at that time, not one out of fifty had a pin-lifting rod out far enough to grab it, don't you?
A. Well, all of the Rock Island engines were so equipped.
Q. Were so equipped?
A. Yes, sir.
Q. The only engines you know about are the Rock Island engines aren't they?
A. Yes, sir; in a general way.

358 E. ALBERTS, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?
A. E. Alberts.
Q. What is your business?
A. Car foreman of the Great Western.
Q. How long have you been car foreman for the Great Western?
A. About three years.
Q. Where is your place of business? Where are you located? I mean in this city or some other city?
A. In this city.
359 Q. Were you called upon by any of the officials of the Grand Island Railway Company to make an inspection of its engine and tender 45 on the 9th day of June, 1910?
A. Yes, sir.
Q. Did you make that inspection?
A. Yes, sir.
Q. Did you make any examination of the coupling apparatus or device upon the rear end of that tender?
A. Yes, sir.
Q. I wish you would tell the jury what you did, how you examined it, what the nature of your examination was?
A. I took the pin lifter out on the outside and worked it, and the coupler worked together, locked them open and the knuckle opened up.
Q. I wish you would tell the jury whether there was any-
360 thing defective or out of order about the pin-lifting rod, the pin or the coupler or anything else?
A. I looked everything over particularly and I could not find anything.
Q. Did you see a photographer down there when you were there, do you know?
A. No, sir.
Q. He was not there while you were there?
A. No, sir.

Q. You know whether the other men had examined it before you got there or not?
A. I don't know.
Q. You don't know about that?
A. No, sir.

Cross-examination by Mr. Parkinson:

Q. Mr. Alberts, that was what day?
A. That was the 9th. Let me see, what was that day.
Q. It was engine 45, wasn't it?
A. Yes, sir; engine 45.
Q. That is a pretty fair representation of it as it was that day? (Handing witness a picture.)
A. Yes, sir; that is it.
Q. This is a very fair representation of that engine as it was there that day, isn't it?
A. Yes, sir.
Q. The rod going across it was perfectly horizontal just as it is there?
A. Yes, sir.
Q. It was not bent at all? And it was fastened at the end just as it is now with the two fasteners at the end?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
361 Q. Now, this mark here, what do they call that? That little iron that has got an X mark on it, what do they call it?
A. It is a grab-iron.
Q. Did you see — there that day?
A. There was no grab-iron that day.
Q. No grab-iron that day?
A. I could not say. I don't think it was there.
Q. You don't know whether it was there or not?
A. No, sir.
Q. You could not say whether there was a grab-iron like the one I have marked there that day, but in other respects it was just the same, like it was that day?
A. Yes, sir.
Q. But you are positive you examined closely to see that that rod ran straight across just as it does there now, and was not bent, it did not sag down in the middle, did it?
A. No, sir; it did not.
Q. It did not sag down in the middle?
A. No, sir.
Q. You are positive about that?
A. I don't know; it had two and one-half inches clearance in here. (Indicating.)
362 Q. It had two and one-half inches clearance in it? It had two and one-half inches clearance above this place, you mean? (Indicating.)
A. Yes, sir.

Q. It had two and one-half inches clearance above this beam along here the whole width, just the same, and you and the other man took your rules and measured it to see that it was two and one-half inches above this beam, didn't you?

A. Yes, sir.

Q. And you put it all along there to see that that horizontal pin-lifting rod was two and one-half inches above this sill at all of these places, didn't you? (Indicating.)

A. Yes, sir.

Q. Now you remember of doing that, don't you? Mr. Slayton done that too? Mr. Slayton had the rule, didn't he?

A. I could not say if he did or not.

Q. One of you had it, didn't you?

A. I had it.

Q. And you took and put it out at the outer edge here and it showed two and one-half inches above the sill beam, and then you put it at that side and it showed two and one-half inches above, didn't it?

A. Yes, sir.

Q. You are positive about that?

A. Yes, sir.

Q. Didn't you?

A. Yes, sir.

Q. Answer up. Don't be afraid about it; you did that, didn't you? You remember of doing it?

A. Yes, sir; I measured it.

363 Q. Tell the jurymen if you measured the distance between the horizontal pin-lifting rod at the outside edges and at the center above the sill?

A. I put my rule on it and measured it.

Q. And it was two inches above all along there?

A. The clearance between the iron and the sill was two and one-half inches.

Q. And it was exactly level and that distance all along there, wasn't it?

A. Yes, sir.

Q. Now let me ask you another thing; it had two upright supports, had it?

A. On the corner of the tank?

Q. On the corner of the tank.

A. Yes, sir.

Q. And those were the only parts that held it?

A. There was two corner grab-irons. Say that again. I want to know how——

Q. How was it supported, by two or more castings?

A. Four.

Q. Four?

A. Yes, sir.

Q. You did not measure how far it was from the tank

364 out to the grab-irons, I mean out to the pin-lifting rod?

A. Well, I should judge about five or six inches.

Q. Five or six inches as you examined it down there that day, the distance between the rear of the tender, the rear part of it out to the pin-lifting rod was five or six inches?

A. Yes, sir.

Q. Out to the pin-lifting rod, you are positive of that?

A. Yes, sir.

Q. Did you also measure that?

A. I did not.

Q. You did not measure it? You are just estimating it and you think it was five or six inches?

A. Yes, sir.

Q. And you are about as positive of that as anything else you have testified to?

A. Well, I can tell five or six inches.

Q. I say you are positive about that?

A. Yes, sir.

365 JAMES H. DONAN, of lawful age, being duly sworn, upon his oath states:

Examined by R. A. Brown, Attorney for Def't:

Q. State you name, please?

A. James H. Donan.

Q. Where do you live?

A. St. Louis, Missouri.

Q. What is your business?

A. General adjuster.

366 Q. For what company?

A. Continental Casualty Company.

Q. How long have you been general adjuster for the Continental Casualty Company?

A. About 25 years.

Q. Are you acquainted with Mr. Ralph Moore, the plaintiff in this case?

A. I can't say that I am acquainted with him.

Q. Have you ever seen him?

A. Yes, sir.

Q. At the time he was injured while employed by the Grand Island did he carry any accident insurance in your company?

A. Yes, sir.

Q. State whether or not you came to St. Joseph for the purpose of making adjustment on that policy?

A. The claim was sent in for adjustment.

Q. And did you come here?

A. Yes, sir; and I came here to St. Joseph, as there was some matters connected regarding the payment of premiums, and I went to the railroad auditor's to look up and satisfy myself as to whether those installments had been paid,—I went from there to the hospital and found Moore at the hospital.

Q. Did you have any conversation about the accident and if so, state what it was?

A. After the preliminary, the introduction, and so forth, I asked Moore the flat question as to how this accident occurred and he told me that he did not know, nor could he explain it to me,—he stated that he was taking the engine on the siding and got hold of the corner of the tender, after which he did not remember anything else,—could not tell me how it happened at all, did not know.

367 Q. Did he tell you whether or not the engine was running or stand-still?

A. He told me he was taking the engine on the siding,—going in on his signal,—they were going in there after a car, he told me that, but as to how the accident happened he said he did not know.

Q. At what hospital did this occur?

A. I think at St. Joseph Hospital, I never had been in the hospital before.

Q. And how long after the accident was it you had this conversation with him?

A. My conversation with him took place on the 12th day of July, 1910.

Cross-examined by Mr. Mytton:

Q. Where do you live?

A. St. Louis, Missouri.

Q. And you are claim adjuster for what company?

A. Continental Casualty Company.

Q. When you came to St. Joseph where did you first go?

A. Where did I first go?

Q. Yes.

A. To the hotel.

Q. Then to the railroad company's offices?

A. Yes, sir.

Q. And you there learned that Ralph Moore had been injured?

A. I had learned that he was injured before I ever came here.

Q. Then where did you go from the railroad offices?

A. To the hospital.

Q. Who was with you?

A. Mr. C. A. Hedrix.

Q. Who is he?

A. Superintendent of the St. Joseph and Grand Island Railroad.

368 Q. And that was on the 12th day of July?

A. I think on the 12th of July as near as I can remember. I came from Chicago here and as I remember I left there on the night of the 11th.

Q. What road did you come on?

A. Burlington.

Q. And you saw him at the hospital?

A. Yes, sir.

Q. That the only time you ever saw him?

A. Yes, sir.

Q. What time of day was that?
A. I think it was in the afternoon,—I am not positive it was in the afternoon.
Q. Do you know who were present?
A. His mother and father and Mr. Hedrix and myself.
Q. Anyone else?
A. No, sir; the nurse was in and out, not in all the time.
Q. Did you take a statement of it in writing?
A. I took a statement of it, yes, sir.
Q. Did he sign it?
A. He did not.
Q. Did you have it signed by anyone?
A. I did.
Q. Who signed it?
A. I think his mother signed it for him,—he had to sign the release for me.
Q. Was he paid the insurance?
A. Yes, sir.
Q. How much?
A. $500.00.
Q. And his mother signed it?
A. I think so; I would not be sure.
Q. Was that the release that was signed?
A. Yes, sir.
369 Q. Anything else except the release?
A. No, sir.
Q. In that release did it specify what the money was paid for?
A. Yes, sir.
Q. But said nothing about how the accident occurred?
A. No, sir.
Q. You took that release back home?
A. Back?
Q. I say you took it back to the insurance company?
A. I sent it back to the insurance company.
Q. When did you meet Mr. Brown?
A. What Mr. Brown?
Q. The gentleman here?
A. Some months ago.
Q. Whereabouts?
A. Here in St. Joseph.
Q. Where at?
A. I believe in his office.
Q. That the first time you met him?
A. I think so.
Q. Then, you told him all about what you knew?
A. No, I never told him all about what I knew.
Q. About Mr. Moore, the conversation you mentioned which took place at the Sisters' Hospital?
A. Yes, sir.
Q. Were you at his office more than once?
A. Not any one day.

Q. At that time?
A. No, sir.
Q. When was the next time you were at his office?
A. I was not in Mr. Brown's office until I guess last Tuesday.
370 Q. Last Tuesday?
A. Yes, sir.
Q. Of last week?
A. Of this week.
Q. Of this week?
A. Yes, sir.
Q. Have you been in since that time?
A. Yes, sir, in there today.
Q. Who is the attorney for the Continental Casualty Company here in this town?
A. The agent?
Q. The attorney.
A. A firm here, but I cannot tell their names—(Do you know, Mr. Brown?)
Q. Who is their agent?
A. Mr. Nagle, 36 Ballinger Building.
Q. And you never put down in writing the remarks that you now say Moore told you as to his knowledge of how it happened, but you have carried it in your head?
A. He submitted that in a proof to our company and it is a matter of record.
Q. In black and white?
A. Yes, sir.
Q. Signed by whom?
A. I don't know who it is signed by.
Q. Have you got that here?
A. We have it.
Q. Whereabouts?
A. In the files of our company.
Q. Where?
A. Chicago.
Q. What place?
A. 1208 Michigan Avenue.
Q. Did you take that statement that they have?
A. That was made before that.
Q. Who took that statement?
A. Don't know.
371 Q. Have you ever seen it?
A. Yes, sir.
Q. Now in Chicago office?
A. Yes, sir.
Q. In whose handwriting?
A. I don't know, some notary public, attested by some notary.
Q. You have seen that, have you?
A. Yes, sir.
Q. Do you know whose signature it is?

A. I do not.
Q. Is it in typewriting?
A. No, sir.
Q. And you don't know whose handwriting it is?
A. No, sir.
Q. And you don't know who the notary is?
A. No, sir.
Q. What is the date?
A. Can't say.
Q. But you do know you have seen it and his mark is to it?
A. Yes, sir.
Q. And he makes the statement that he did not know how it happened?
A. Yes, sir,—we have a question in our blanks that covers that.
Q. You are as positive about that as you are about any other statement you have made?
A. Yes, sir; and can prove it too. I am held responsible and have to get the facts.
Q. You have no idea who wrote that statement out?
A. I have not.
Q. Was he lying in the bed?
A. Sitting up.
Q. On the bed?
A. Yes, sir.
Q. What time of day was that?
A. I got there about three and left there about half past six.
372 Q. How long were you there?
A. I got there about three and left at half past six or quarter of seven, about two and one-half hours.
Q. Was his mother there all the time?
A. Yes, sir.
Q. And father?
A. Yes, sir.
Q. And Mr. Hedrix there?
A. Yes, sir.
Q. What was Mr. Hedrix's interest?
A. He was not interested at all,—I had never been to the hospital and he kindly volunteered to go and introduce me.
Q. Why was it necessary for a Grand Island man to go there and stay from three to seven o'clock.
A. Was not there that long.
Q. He was there about three hours?—Who was he at that time?
A. I was introduced to him at the general office to get the information as to the payments.
Q. What position did he hold?
A. I think superintendent.
Q. Of the Grand Island?
A. Yes, sir, of the Grand Island.
Q. What man in Chicago has charge of this statement which you state is on file?
A. Claim department.

Q. What man is in charge?
A. There is a Board of Review. Robert W. Hyman.
Q. Does he have charge of this statement?
A. Mr. P. N. McCaughn, he is a son of the old George
373 E. McCaughn, General Claim Attorney of the Rock Island, and P. F. McCall.
Q. Those three men have charge of this valuable paper?
A. They have charge of the department.
Q. And of this particular statement?
A. Yes, sir.

Mr. Brown: I desire to introduce in evidence, your Honor, the statement made by Mr. Moore before the notary public, Mr. Purvis.

Said paper is called Affidavit of Claimant as to Limb Loss, and is as follows:

("This blank is furnished for the purpose of making final proof and should be filled out and returned as soon as disability has terminated. The furnishing of this blank shall not be construed as an acknowledgment of any liability on the part of the company, nor as a waiver of any of the condition- of the contract.")

Affidavit of Claimant as to Limb Loss.

1. Full name, Ralph William Moore; Age 22; Weight, 140; Height, 5′ 6″; Policy No., 2,023,452.
2. State dates of last three payments on policy (1) April, 1910; (2) May, 1910; (3) June, 1910; To whom paid? C. C. Co.
3. Indemnities provided: Principal sum $500.00; For loss of Limb? (Not answered.)
4. When did the injury occur? Month: June; Day: 9th, 1910; Hour: 9:15 A. M.
5. How long did you continue at work before laying off entirely?—Could not work.
374 6. What was your occupation at time of injury?—Freight Brakeman.—Have you any other occupation?—No.
7. Describe fully all your usual duties.—Those of an ordinary freight brakeman.
8. If in train service, were you on freight, passenger or mixed train at time of injury?—Freight?
9. State name of company or corporation for which you were working when injured?—St. Joseph and Grand Island Railway Company.—Address?—St. Joseph, Missouri.
10. Give name of your superintendent?—F. T. Slayton.—Address? St. Joseph, Missouri.
11. What were you doing at the time injury was received, and how did it happen?—Taking engine onto siding to couple onto car—Doing local switching. Fell in front of Tender and was run over by tender of engine; Engine was backing up.
12. State fully where you were at the time (If in city or town, give street and number, if on railroad, at what point?)—Marysville, Kansas.

13. When did you quit work?—As soon as injured, 6-9-10.
14. What injury did you receive?—Both hands cut off, left leg broken, Two ribs broken on right side, and lung punctured.
15. If injury necessitated amputation of limb or limbs, describe fully—(Check mark).
16. At what point was amputation made?—(Check mark.) By whom? (Check mark.) When? (Check mark.) Where? (Check mark.)
375 17. How long were you confined in the house? (Blank.) In hospital?—Indefinitely.
18. Who were present at the time injury was received? Name?—Roy Pigg. P. O. Address? Hiawatha, Kansas.
" (Blank.) " (Blank.)
19. Have you any other accident insurance?—No.
20. Had you received any injury prior to the one herein mentioned?—No.—If so, state when and what it was:—(Check mark.)
21. State name and address of doctor first called after this injury.—Dr. J. L. Hausmann, Marysville, Kansas.
22. Have you been sick within five days prior to this injury?—No. Give name of disease and name and address of physician or physicians who attended you in such sickness: (Check mark.)
23. Had you any old injury, disease, infirmity or defect in this limb?—No.—If so, what? (Check mark.)
24. Were you up to the time you received this injury in sound condition mentally and physically?—Yes.
25. What were your habits as to the use of intoxicants and drugs? —Temperate, not addicted to their use.
26. Were you under the influence of intoxicants or narcotic drugs at the time of the accident?—No.
376 27. What was your average wage or income?—$80.00 per month.
28. Where were you born?—St. Joseph, Missouri.—Date of birth?—18th day of February, 1888.
29. Have you given all the facts relative to the manner in which this injury was received?—Yes.—If not, attach full explanation. (Blank.)
30. What indemnities are you claiming? Face of policy, $500.00 (Five Hundred Dollars.)

I, the undersigned, do hereby warrant the foregoing answers and statement to be correct and true, without evasion or reservation, and I agree if any are found to be untrue, all rights under the policy shall be void. And I further agree that the Company's check mailed me in advance of the date due, in payment according to the terms and conditions of my policy and the facts in the case, shall be for myself, my heirs, executors, administrators, assigns or beneficiaries, full satisfaction, discharge and release of any and all claims or liability now existing on account of said injury, or any future loss resulting therefrom. Dates this 28th day of June, 1910.

(Claimant's name in full.) RALPH WILLIAM MOORE.
(By his mark.)

Street Address—1424 Sacramento Street; City or town, St. Joseph; State of Missouri.

STATE OF MISSOURI,
County of Buchanan, ss:

Personally appeared before me the said Ralph W. Moore, personally known to me to be the person he represents himself to be, and subscribed and made oath to the truth of the foregoing statement.

Witness my hand and official seal at my office in St. Joseph this 28th day of June, 1910.

[SEAL.] (By) W. N. PURVIS,
Notary Public.

"Def't Ex. 4".

377 Mr. Parkinson: We ask to read in evidence the affidavit of Roy Pigg admitted in evidence.

The Court: That is the affidavit to the insurance paper?

Mr. Parkinson: Yes.

Said paper was then read, marked Exhibit J and is as follows:

Affidavit of Eye Witness.

In Relation to Injury of Ralph William Moore.

1. What is your name? Roy Pigg. Occupation? Conductor, freight.

2. Were you an actual eye witness to the injury claimed to have been received by Claimant? Yes.

3. Or was your attention called to it shortly afterward? (Check mark) If so, when? (Check mark).

4. Where were you at the time? I was standing about 20 feet from the accident.

5. What was Claimant doing when injured? Opening knuckle on back end of tank.

6. How far were you from him? About twenty feet along side of track—just opposite him. (Explain fully your relative position.)

7. Where did the accident happen? Marysville Yards, Marysville, Kansas.

8. On what date was the injury received? June 9th, 1910; 9:15 A. M.

378 9. What caused the accident? Stumbled and fell.

10. What was Claimant's occupation? (If more than one, give all.) Freight Brakeman.

11. Did you personally examine the injury? Yes. When? At once.

12. Describe the exact nature and extent of the injury received? Both hands cut off at wrists; left leg broken and right lung injured.

13. In what manner did it affect him? Rendered him unconscious; totally disabled.

14. Did Claimant quit work at once? Yes. How long did he work after receiving the injury? Could not work.

15. To what extent, if any, was Claimant under the influence of intoxicants or drugs? None.

16. Give name and address of other witnesses? G. G. Miller, Section Foreman St. Joseph and Grand Island Railway Company, Marysville, Kansas.

17. By what company, Corporation or person are you employed? St. Joseph and Grand Island Railway Company, St. Joseph, Missouri.

(Eye witness sign here) ROY PIGG.

STATE OF KANSAS,
County of Brown, ss:

Address: Hiawatha, Kansas.

Personally came before me Roy Pigg and subscribed and made oath to the foregoing statement.

379 Witness my hand and official seal this 28th day of June, 1910.

[SEAL.] (By) M. E. ROSENBERGER,
Notary Public.

Term expires November 30th, 1910.

Exhibit J.

Exhibit I was then read and is as follows:

"Affidavit of Employer or Superior Officer.

1. Were you acquainted with the person described as the Insured in "Affidavit of Claimant?" Yes. If so, how long had you known him? Since August 4th, 1909.

2. Did he to your knowledge and while in your employ receive injury claimed? Yes.

3. What was his occupation at the time of injury? Freight train brakeman.

4. On what work was he engaged at the time of the accident? Switching service, taking engine onto siding to couple to cars.

5. On what date did the accident occur? June 9th, 1910, 9:15 A. M.

6. On what date did he quit work? Same.

7. Where did the accident happen? Marysville, Kansas.

8. How do you understand the accident happened? (Describe fully.) Was walking along in front of engine tank which was backing up, accidentally fell. Engine tank ran over him.

9. What were the weather conditions? Clear daylight.

380 10. On what date was the amputation performed? June 9, 1910. Where? Marysville, Kansas.

11. Was amputation, in your judgment, nesessitated solely by reason of the injuries referred to? Yes.

12. Had Claimant, on the day of the accident, used any intoxicant or narcotic drug? No.

13. Had Claimant any mental, physical or constitutional infirmity, defect or disease at the time of the accident? None known.

14. Is the statement of Claimant, No. 1, corroborated by the Personal Injury Report to your Company? Yes.

(Signed) C. E. HEDRIX,
Official Position, Ass't Superintendent.

Company? St. Joseph and Grand Island Railroad Company.
Address? St. Joseph, Missouri.

STATE OF MISSOURI,
County of Buchanan, ss:

Personally appeared before me the said C. E. Hedrix, personally known to me to be the person he represents himself to be, and subscribed and made oath to the truth of the foregoing statements:

Witness my hand and official seal at my office in St. Joseph, this 28th day of June, 1910.

(Signed) W. N. PURVIS,
Notary Public.

Plaintiff's Exhibit I.

F. J. STEVER, *Reporter.*

Thereupon the defendant rested its case.

381 The plaintiff introduced the following testimony in rebuttal:

PATRICK F. BARRY, called as a witness on the part of the plaintiff, first being duly sworn, testified as follows:

Direct examination by Mr. Mytton:

Q. State your full name, please, to the court and jury?
A. Patrick F. Barry.
Q. What is your occupation?
A. Switchman at the present time.
Q. With what company are you working?
A. The Burlington.
Q. The Burlington?
A. Yes, sir.
Q. Have you ever been assistant yardmaster?
A. Yes, sir.
Q. How long have you been connected with the Burlington Railway Company?
A. Well, I first commenced with the Burlington in 1876.
Q. In 1876?
—. —.
Q. How long have you lived in St. Joseph?
A. Since 1866.
Q. Mr. Barry, I hand you here Plaintiff's Exhibit "H," and where the point of the pencil now is, the iron rod which extends across the back of the tank, I wish you would state to the jury what that is?

Mr. Brown: I object to this as being not proper rebuttal, but

their case in chief. If there is any evidence in this case that we did not have proper grab-irons or proper appliances upon the tank, that is their case in chief, and not in rebuttal, and I object to it at this time, your Honor.

382 The Court: Objection overruled.

To which action and ruling of the court the defendant at the time then and there duly excepted and still excepts.

Q. I ask you first to state what the long iron is that extends clear across the back on the tender of the engine shown in the picture? (Handing witness photograph.)

A. That is a pin-lifter.

Q. A pin lifter?

A. Yes, sir.

Q. What is the purpose of that pin lifter?

A. That is to disconnect a car from the engine, and the engine from a car.

383 Q. Please look at the steps in the back of the tank of that engine extending up from the pin lifter to the top of the tank, and state what that is?

A. Simply a ladder.

Q. A ladder?

A. Yes, sir.

Q. Please look at the irons——

Mr. Brown: I want it understood that all of these questions are objected to, your Honor, for the reasons that I have stated.

The Court: Very well.

Mr. Brown: That it is not proper rebuttal.

The Court: It may be shown.

Q. Please look at the iron rods which are on the side and end of the tender extending up from the pin-lifting rod up to the top of the tender, and state what they are?

A. That is a hand-hold, and that a stirrup. (Indicating.)

Q. Those are stirrups at the side?

A. Yes, sir.

Q. What is the purpose of those stirrups?

A. Why, for a man in coupling of a car to get on that stirrup and get a hold of this hand-hold and then disconnect his——

Q. The hand-hold you see on the side and perpendicular?

A. Yes, sir.

Q. Now will you state what the irons are in the beam and on each side of the coupler?

A. Those are grab-irons.

Q. And are there any other grab-irons in that picture except those two?

384 Mr. Brown: That is objected to as not proving any fact in this case, your Honor, or tending to prove any fact in controversy.

A. No, sir.

The Court: Objection overruled.

To which ruling of the court the defendant then and there excepted and still excepts.

Q. There are not?
A. No, sir.
Q. Now you say that you have been connected with the railway company since 1876?
A. Yes, sir; I first commenced railroading in 1876.
Q. And you are now switching in the Burlington yards in this city?
A. Yes, sir.
Q. And you have been for how many years switching?
A. I have been 19 years in continuous service this last time with the Burlington.

Cross-examination by Mr. Brown:

Q. You say you have been an assistant what at what time?
A. Assistant yardmaster.
Q. Assistant yardmaster?
A. Yes, sir.
Q. You say the rod that extends along at the rear end of the tender is called the pin-lifting rod?
A. Yes, sir.
Q. What was it called before June 9th, 1910?
A. That is the only name I ever knew for it.
Q. What purpose did it serve? What was it used for?
A. It was used simply for the purpose of pulling pins.
385 Q. Never used for any other purpose, was it?
A. Not as I am aware of.
Q. You never knew of one of those rods to be set out two and one-half inches in the clear, did you?
A. No, sir.
Q. Never saw one in your life, did you
A. No, sir; as I recollect.
Q. All those that you ever saw set right up against the tender?
A. Yes, sir; right on the engine tank; yes, sir.
Q. On the engine tank and set right up against it?
A. Yes, sir.
Q. You never knew one being used as the hand-hold or grab-iron, did you?
A. No, sir.
Q. Being used for that purpose?
A. No, sir.
Q. Never heard of one being used for that purpose, did you?
A. No, sir.
Q. Suppose that the pin-lifting rod extended entirely across the end of the tank just exactly as you see the rod extending across the end of the tank in Defendant's Exhibit 5, suppose that it stood out from the car, the body of the tender, about five or six inches and up from the beam two and one-half inches—do you see it there? (Indicating.)

A. Yes, sir.

Q. Could a man hold to that?

A. Why, if it extended up that far he could catch a hold; yes, sir.

Q. That would make a good grab-iron, a thing of that kind, constructed the way I have described it?

A. Well, in a case that I would be pulling a pin it would make no grab-iron for me.

386 Q. What would you want on it?

A. I would want this hand-hold on the outside and this stirrup in the first place, and then if I could not get to that, I would get this grab-iron on the end of the car or on the end of the engine.

Q. You are talking of uncoupling a car when you are standing at the side of it?

A. Yes, sir; or inside of it, in between the car and the engine.

Q. Well, you would not use a grab-iron then in the center at all?

A. Not if I could avoid it; if I could stay on the outside I would not, no, sir.

Q. Of course, if you could stay on the outside, you would not need one at all, would you? But suppose you were on the inside, suppose you went in between the cars to make a coupling or to uncouple the cars, and suppose you found a rod of the construction that you see there, or the construction that I have described, and suppose you went to take hold of it, would there be anything to prevent it?

A. Well, no; not if the rod was far enough away so a man could get a hold of it.

Q. I said, suppose it was five or six inches away from the car, and two and one-half inches away from the bottom of the sill, suppose it is now, and you wanted to take hold of it, anything to prohibit you from doing it?

A. Not that I know of.

Q. That would make a good grab-iron, wouldn't it, constructed like that?

A. It would if you had occasion to go in between the cars.

Q. If you were not in between the cars, you would not want it there at all, would you?

A. Well, that question I could not answer intelligently for the simple reason why, if there was not some defect in these cars and those engines, between the couplers, a man would not have

387 any occasion to go in between them.

Q. A man is not supposed to go in there at all, is he?

A. No, sir; he is not.

Q. And he is absolutely prohibited from going in?

A. No, not absolutely.

Q. It is against the rules?

A. It is the custom far a man in coupling off a car, if he cannot hang on the side, then he gets the grab iron on the end of the car, and puts his foot upon the——

Mr. Brown (interrupting): On the stirrup?

A. Not on the stirrup, but on the boxing of the truck, and if the boxing is not on that end, put it on the brake beam, then pull on the pin.

Q. In other words, men are supposed to use the lifting rod, aren't they?

A. Yes, sir.

Q. And that is what they are put there for?

A. That is the purpose they are put there for.

Q. Now then a rod that ran entirely clear across the rear end of the tender, ran entirely across, starting in say within eight or nine inches of the side of the tender, and from four to six inches away from the tender, and two and one-half inches away from anything on the bottom, that extended clear across, would be a great deal more protection to a man than one little one on this end and one little one on this end over here, wouldn't it? (Indicating.)

A. Well, they could get a hold of it.

Q. That is what I am saying, and if there was two and one-half inches in the clear, he could get a hold of it?

A. Yes, sir; if it was two and one-half inches he can get
388 a hold of it, a drowning man will grab for a straw.

Q. I say, if there was two inches in the clear it was ample?

A. Yes, sir.

Q. Two inches is ample for a man to get a good hold?

A. Yes, sir.

Q. And then there is no reason why a man should not get a good hold on a rod that was cut out four or five inches on the back side and two to two and one-half inches on the other side?

A. Yes, sir; and still I would not consider that as safe as a grab-iron.

Q. I know that. I am saying a rod of that length was a great deal better than two little ones, one on either side?

A. That is, if they are secure.

Q. If they are secure?

A. Yes, sir.

Q. Now then look at that. Look at that rod put on like that one, would you consider that secure? Just look at that and see what you think about it? (Handing witness picture.)

A. It is secure; but in placing some of those rods on the back of a tank similar to that, they are bolted down so close.

Q. I am not talking about that. I am ta-king about this one right here, the one that you see right there? (Indicating.)

A. I could not measure the distance by that.

Q. But I am saying, suppose that one is two and one-half inches from the bottom and standing out four to six inches—it is securely fastened, isn't it?

A. Yes, it looks like it is securely bolted.

Q. Have you ever been a member of the Master Car
389 Builders' Association of this Country?

A. No, sir; I have not.

Q. Have you ever attended any of its meetings?

A. No, sir.

Q. Do you know anything about their rules or regulations or what they prescribe or anything about it?

A. No; just only from working with their work.

Q. Do you know whether or not they prescribe that the coupler unlocking rod when properly located and having proper clearance around it is a suitable end hand-hold, do you know whether they prescribe that or not?

A. I could not say.

Mr. Parkinson: We object to that as improper. That was not offered for that purpose. Mr. Brown limited his offer when he offered it in evidence. He has no right to cross examine a witness about some rule that some private aggregation of people have made. It does not test the witness's memory or anything of that kind.

The Court: The witness says he does not know anything about this association.

Mr. Brown: I know, but I wanted to see whether he did or not; I wanted to see whether he did or not. Suppose they did not use that for a pin-lifting rod, suppose they did not have those two little curved handles placed there, but that the rod just run along there and was fastened in that way and had a length of two and one-half inches at the bottom and was out four to six inches on the side, that would be a mighty good grab-iron, wouldn't it?

A. Why, yes; if the rod was secure, it would make a good grab-iron.

Q. I said, suppose it was secure, and that one is secure,
390 looks like it is secure?

A. It is supposed to be from the looks; yes, sir.

Q. Suppose it was as secure as that one is secure, and suppose it just did not have those little handles on it, and suppose you did not use it for a pin-lifting rod and had it along on there that way, it would be a mighty good grab-iron wouldn't it?

A. Yes, unless it would come loose.

Q. Now suppose it was secure?

A. You must remember that these are not secure; they turn; they turn in a man's hand, while a grab-iron can't do that.

Q. Why, the rod turns in a man's hand when you get a hold of it?

A. They surely would.

Q. Would it make any difference if he had a hold of it, if it turned?

A. Why, sir, I have had them come loose with me from the body of a car.

Q. Those pin-lifting rods?

A. Yes, sir.

Q. You used them then as a grab-iron?

A. No.

Q. How did it come loose?

A. From the simple reason I have been on the front end of an engine and they would work loose.

Q. You have used the pin-lifting rod on the front end of the engine?

A. No, sir; never used anything on the rear end of the train on the head end, that is a sure thing.

Q. That looks secure? (Indicating.) Better look at it.

A. It looks secure to me.

Q. That looks secure? Suppose it could not come off and just holds on, that is a pretty good hand-hold, isn't it?

A. Why, it should be; yes, sir.

390½ Redirect examination by Mr. Mytton:

Q. Mr. Barry, you say that those grab-irons which are in the tender at the ends are what you call grab-irons? (Indicating.)

A. Yes, sir.

Q. I will ask you whether or not there are any other ap-
391 pliances that are in railroad parlance called grab-irons except those that you have mentioned?

Mr. Brown: Just a minute. That is objected to, your Honor, as to what they are called, if it is a suitable appliance for a grab-iron; you might call it a lifting rod or a brake beam or anything else. If it is a suitable appliance for a hand-hold or a grab-iron, it is wholly immaterial what you call it, and besides that is a part of their case in chief, and not proper rebuttal.

The Court: That is so; if it is something that can be used; but the objection is overruled.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. (Question read.) "I will ask you whether or not there are any other appliances that are in railroad parlance called grab-irons, except those that you have mentioned."

A. That is stating to this case on the back of that tank?

Q. Yes, sir.

A. Them are the only two grab-irons that I can recognize on the tank.

Q. Now when you stated awhile ago that this pin-lifting rod will turn in your hands, how far can that turn, will you state to the jury?

Mr. Brown: That is objected to for the same reason that it is a part of their case in chief and not proper in rebuttal.

The Court: Objection overruled.

To which ruling of the court the defendant then and there duly excepted and still excepts.

A. Well, it can turn the full length of that chain.

392 Q. It can turn the full length of that chain?

A. Yes, sir.

Q. What is the customary length of that chain that connects the rod with the coupler?

A. Well, I don't know exactly the length of it; some of those pin lifters are set higher than others, and some of the draw bars are different makes.

Q. Well, several inches at least?

Mr. Brown: That is objected to as leading, your Honor, and suggestive of the answer desired.
The Court: Objection sustained.

Q. To the best of your recollection what is the length of those chains, what will they average
A. Well, not over five inches, I don't think, five or six inches.

Recross-examination by Mr. Brown:

Q. Suppose that a rod like this were run through rings, suppose it was not fastened at all, except just run through, would you tell the jury that you could not get a hold of it and hold onto it?
A. No, sir; I would not tell the jury that.
Q. You would not tell the jury that at all, would you?
A. No, sir.
The Court: Mr. Barry, you said something about this pin-lifting rod turning in your hand. Suppose a brakeman went in between two cars or behind a tender to do something with the brake, to open a knuckle, would it be necessary to actuate or turn that pin-lifting rod as he worked there, is that what you mean?
A. Why, no, not necessarily.

393 R. E. MALONE, called as a witness on the part of the plaintiff, first being duly sworn, testified as follows:

Direct examination by Mr. Mytton:

Q. Your name is R. E. Malone?
A. R. E. Malone.
Q. What is your occupation, Mr. Malone?
A. Switchman.
Q. What company are you working for?
A. Great Western.
Q. At the present time?
A. Yes, sir.
394 Q. How long have you been working for the Great Western as a switchman?
A. Nine years.
Q. Mr. Malone, please look at the exhibit which I hand to you, designated as Plaintiff's Exhibit H, and state to the court and jury what the iron rod is that extends clear across the rear on that tender and partially extends down?

Mr. Brown: That is objected to, your Honor, as not proper rebuttal testimony, and as being their case in chief.
The Court: Objection overruled.
To which ruling of the court the defendant then and there duly excepted and still excepts.

A. It is the pin lifter.
Q. What is its function and purpose?
A. To work the coupler.

Q. Has it any other purpose or function?
A. No, sir.
Q. Look at the stirrup steps upon the sides and the end of that tank, and say what they are.

Mr. Brown: This is all objected to for the same reasons, your Honor.
The Court: Yes; objection overruled.
To which ruling of the court the defendant then and there duly excepted and still excepts.

A. That is the steps for getting on and off, and side hand-holds on the tank.
Q. Those hand-holds that you mention there, they run
395 perpendicularly up and down above the cross beam, do they?
A. Yes, sir.
Q. Those are what you call hand-holds?
A. Yes, sir; side hand-holds on the tank.
Q. Side hand-holds?
A. Yes, sir.
Q. Now, what do you call the iron that runs perpendicularly on the rear of that tank with cross pieces above the pin-lifting rod?

Mr. Brown: That is objected to for the same reason.

A. That is the end ladder.
Q. That is a ladder?
A. Yes, sir.
Q. Has that any other function that you know of except as a ladder?
A. No, sir.
Q. Will you state to the court and jury what the two iron braces are on either side of the coupler fastened into the beam there?
A. Those are grab-irons, rear grab-irons.
Q. Will you state whether or not there are any other grab-irons in that picture except those that you have testified, and the hand-holds which are perpendicular as you stand on the step?
A. There is none.

Mr. Brown: It is understood that this is all objected to, your Honor?
The Court: Yes.

Q. When a switchman takes a hold of the lever of that pin-lifting rod and for some reason it does not work, is it ever customary
for him to go inside to fix the knuckle so it will work,
396 couple or uncouple—with his hands?
A. It is.

Mr. Brown: Wait just a minute. I want to object to that, as not being what is customary to do on any other railroad—the employes of the Grand Island are bound by their own rules and regulations, and it is not proper to show what was done on other railroads, and part of their case in chief anyway.
The Court: Objection sustained.

Q. Did you ever work on any other road than the Great Western?
A. No, sir.
Q. You have only worked on the Great Western? I will ask you for a man who is coupling or uncoupling cars, what appliances upon that engine there is the safest for him in the performance of his duty, to be upon that engine?

Mr. Brown: Wait a minute. That is calling for a conclusion of the witness, your Honor.
The Court: Objection sustained.

Q. You say that those are the only grab-irons that there are on there? That is what you call a grab-iron?
A. The side grab-irons and those end grab-irons.
Q. State whether or not two years ago it was customary to use that pin-lifting rod as a grab-iron for men working in coupling and uncoupling cars?

Mr. Brown: We object to that. It has not been shown that he knows the custom.
The Court: Objection sustained.

Q. Do you know the custom?
A. Yes, sir.
397 Q. You did know the custom?
A. Yes, sir.
Q. Was it customary?
A. No, sir.
Mr. Brown: Wait just a moment. Would you kindly wait until it is passed on.

Mr. Brown: Did you know I was objecting?
The Witness: No, sir.
Mr. Brown: That is objected to for the reason that it is wholly immaterial what the custom may have been with respect to grabbing hold of it; the law is, if it was there and was suitable as a grab-iron, it is not necessary whether it was customary to grab it or not, if it was there and could be grabbed to.
The Court: The question is as to the customary equipment here, but it may also be shown what substitutes, if any, there were for the equipment that is claimed to be proper.
Mr. Brown: That was not the question asked. The question asked was whether it was customary to grab hold of the pin-lifting rod. That is objectionable for the further reason that it has not been shown that it stood out four to six inches with a clearance of two and one-half inches, the pin-lifting rod that he has reference — may be up against the end of the tender.
The Court: Objection sustained.

Q. Why was it not customary to use the pin-lifting rod as the grab-iron, if you know?

Mr. Brown: Wait just a moment. That is assuming he said it was

not customary to use it when he never said it at all, and the ob-
398 jection was sustained to the question.

The Court: Objection sustained. You have a right to prove the custom of railroads generally regarding these grab-irons.

Mr. Parkinson: The question is, whether or not these grab-irons were customarily placed so they could be used.

The Court: You can ask him that.

Mr. Mytton: State whether or not, Mr. Malone, in June, 1910, and prior thereto, these grab-irons that you have mentioned, it was customary to have grab-irons on the ends of cars and on the ends of tenders which could be used as grab-irons or not, for the greater security of the men?

Mr. Brown: That is objected to as part of their case in chief and not rebuttal.

The Court: Objection overruled.

A. Well, it was customary to have grab-irons as long as I can remember.

399 Cross-examination by Mr. Brown:

Q. I wish you would look at the photograph marked Exhibit 5, will you? (Handing witness a photograph.) Do you see the ladder on the end there?

A. Yes, sir.

Q. That is not a grab-iron, is it?

A. No, sir.

Q. Or a hand-hold?

A. No, sir.

Q. That is a ladder, isn't it?

A. Yes, sir.

Q. That commences just at the buffer beam, doesn't it?

A. Yes, sir.

Q. Up above the coupler?

A. Yes, sir.

Q. A man can reach that from the ground, can he not?

A. Some of them you can and some of them you cannot.

Q. About how high is the first round of that ladder?

A. A man standing straight up, he can reach it.

Q. I mean, about how high is it?

A. Well, I should judge it is about six feet.

400 Q. You think that is six feet high?

A. Close to it.

Q. How high is the coupling device of an engine and tender?

A. About four feet, I believe is the average.

Q. Thirty-six inches, isn't it, from the ground?

A. I don't know.

Q. Just look at that ladder, keep your eye on that and suppose that ladder extended clear down to the bottom of the tender and was a ladder, it still would not be a grab-iron, would it?

A. No, sir.

Q. But suppose that the ladder had cross-bars in it, that stood out from the car six inches and that it was two feet wide, or eighteen inches wide, and was built as it is there, as a ladder, that would still be a ladder?

A. Yes, sir.

Q. It would not be a grab-iron, would it?

A. No, sir.

Q. But if it came down to the bottom of the car and had those cross-bars all across there, a man could in a pinch get a hold of it and hold it?

A. Yes, sir; he could get hold of it.

Q. What would be the difference in getting hold of that bar and any other bar?

A. It is not put on them for that purpose.

Q. It could be used for that purpose?

A. In case of a pinch.

Q. That would be just as good as any other bar of iron put across?

A. Just as good.

Q. Suppose in place of having two little ones, one put on this side of the tender in the beam back here and another one put
401 over on this side of the beam, suppose in place of that we had one great long rod that run clear across the top of the beam, run clear across, that it stood out from the car five inches, had a clearance from the bottom of two and one-half inches, securely fastened, and suppose it didn't have the handles turned down on it at the end and didn't have a chain and a pin attached to it in the center, would that make a grab-iron, you think?

A. No, sir.

Q. Why not?

A. It would make a good grab-iron—but that would be a grab-iron, but the pin-lifter would not be.

Q. I am just asking you about the other one first.

A. That would be a good grab-iron, stationary; yes, sir.

Q. If it was securely fastened it would be a good grab-iron?

A. Yes, sir.

Q. If it had two handles that turned down, that would not make any difference?

A. Not if it was stationary.

Q. Not if it was stationary?

A. No, sir.

Q. Suppose it had a little chain attached in the center of it, and it run down, would that make any difference?

A. No, sir; not if it was perfectly secure, it would not.

Q. Now, does that look to be securely fastened, that rod along there? (Indicating.)

A. Yes, sir; but it is not stationary.

Q. You mean, it can be turned this way?

A. It can be slipped this way usually.

Q. It can be slipped?

A. Yes, sir.

402 Q. Do you say that there is any play in that rod?

A. I never saw but very few of them that there was not.

Q. That is very slight, is it not?
A. But it is not stationary.
Q. Well, it is secure though, isn't it, you cannot pull it out?
A. I don't know if you can pull it out.
Q. If you can get a hold of it, you can hold it, can't you? You can hold on to it?
A. Yes, sir.
Q. No reason why you can't hold on to it?
A. If it turns it is not stationary.
Q. When you get a hold of a loose rod, it don't turn when you get a hold of it?
A. Turns enough to make you let loose of it.
Q. You would have to turn it with your hand to turn it? The rod can't turn unless you turn it with your hand, can it?
A. It cannot turn.
Q. You think it might work backwards and forwards?
A. We have nothing there that is stationary.
Q. You can hold onto it even if it worked a half an inch or an inch?
A. Hold on to it probably. If a man is depending on his life he wants something stationary to hold on to.
Q. Why do you say that you can hold on to it better if stationary?
A. Because it is stationary, that is all. It is fastened on there all right.
Q. This rod has not very much play anyway ?
A. They have some.
Q. Very little, though?
A. Some more than others.
403 Q. Some more than others?
A. Yes, sir.
Q. But in any event you would not tell the jury that you could not take hold of it and stand and hold on to it, would you?
A. Why, I can hold on to it, yes, if it don't turn and slip one way or the other.
Q. But you do tell the jury that it would turn so you could not hold onto it?
A. I would not say that this one did. I have seen them that would.
Q. Suppose there was some rings attached to the edge of the table here, one ring here, and one here and one over there, and I would slip this ruler through here, would you want the jury to understand that you could not catch a hold of it and hold on to it?
A. Not if I could get my hands clear around and have a good hold of it.
Q. But if you had your hands around it?
A. You have to get your hands around it to hold on — it.
Q. So if you do get your hands around it, you can hold on to it?
A. Yes, sir. You can hold onto it if it don't turn and slip with you.
Q. Even if it is loose, suppose it is loose in that position as I say through rings, in that position, you can hold to it, can't you?

A. Yes, sir; if I can get a good hold, I can hold onto it.
Q. If you can get your hands around it you can hold it?
A. Yes, sir.

Redirect examination by Mr. Parkinson:

Q. Tell the jury whether or not even if you had a hold of it, it would be of the same assistance in keeping you from falling as a stationary one firmly secured?
A. No, sir.

404 Mr. Brown: That is objected to. The defendant is not required to have the best.
The Court: No; the defendant is not required to have the best, and that is leading anyway and the objection is sustained.
Mr. Brown: I ask that to be stricken out.

Q. State whether or not any loose pin-lifting rod which turns and has lateral motion is a good grab-iron to assist in coupling and uncoupling cars?

Mr. Brown: That is objected to as calling for a conclusion, your Honor, and the opinion of the witness.
The Court: Objection sustained.

Q. All of the answers have been opinions by experts on questions. State whether or not it was customary to equip engines with a pin-lifting rod that could be used as a hand-hold in 1910, and in June and prior thereto?

Mr. Brown: It is objected to as case in chief and not proper rebuttal.
The Court: Objection overruled.

A. No, sir.
Q. State whether or not it was customary to equip them with a ladder that could be used as a grab-iron?
A. No, sir.

Mr. Brown: Objected to for the same reason.
The Court: Objection overruled.
To which ruling of the court the defendant at the time duly excepted and still excepts.

405 Recross-examination by Mr. Brown:

Q. Do you know anything about what the Interstate Commerce Commission has designated as a hand-hold?
A. No, I do not.
406 Q. As a compliance with the law—you don't know anything about that?
A. I know how they are to be put on, supposed to be put on according to the law—I never read the books on it.
Q. Did you ever see the part that I am showing you, pilot beam, hand-holds, location—where it is indicated there, just look at it a minute. (Handing witness a book.)

Mr. Parkinson: We object to that cross-examination. He never said that he ever saw that.

The Court: Objection overruled.

Q. Just tell the jury whether or not you ever saw that or not.
A. No, sir; I never saw it.
Q. You never saw that?
A. No, sir.
Q. And yet you are attempting to tell what was the customary and proper hand-hold upon cars aren't you?
A. That says the front end, we were speaking of the rear end.
Q. Does that make any difference which end it is? Is there a coupling device on the front end of the engine as well as on the rear end?
A. The coupling device is the same.
Q. Is the pin-lifting rod the same?
A. No, sir. You have room for a pin-lifting rod, or a grab-iron, where you would not have on the rear end.
Q. Suppose you make room? The uncoupling lever across the front end of the engine is not stationary, is it?
A. No, sir.
Q. It turns just like the other one?
A. Yes, sir; it is not stationary.
Q. It turns just like the one across the rear, doesn't it?
A. It is not stationary.
407 Q. Well, it turns just like the one across the rear end?
A. It can't be stationary.
Q. The question was, that it turns just like the one across the rear end, doesn't it?
A. Yes, sir.
Q. If it would be a good hand-hold on the front end, if you give it plenty of room, it would be a good hand-hold on the rear end, wouldn't it?
A. Yes, sir; if it is good for one end it ought to be good on the other end.

Witness dismissed.

MORRIS WASSERKRUG, called as a witness on the part of the plaintiff, first being duly sworn, testified as follows:

Direct examination by Mr. Parkinson:

Q. What is your name, please?
A. Morris Wasserkrug.
Q. What railroad do you work for?
A. Rock Island.
Q. In this city?
A. Yes, sir.
Q. In what capacity?
A. Switching.
Q. How long have you been working for them?

A. Between four and five years.
Q. Between four and five years?
A. Yes, sir.
Q. State whether or not you know how the rear end of tenders were customarily equipped prior to June 9th, 1910, with reference to having grab-irons on the rear end of them?

408 Mr. Brown: That is objected to as a part of the case in chief and not proper rebuttal, your Honor.
The Court: Objection overruled.
To which ruling of the court the defendant at the time duly excepted and still excepts.

A. All I have seen have grab-irons on the end of each tank of each engine.
Q. That was prior to June 9th, 1910?
A. Yes, sir; as long as I have been working for the Rock Island.
Q. As long as you have been working for the Rock Island?
A. Yes, sir.
Q. Will you look at the plaintiff's Exhibit "H," which I hand you, the rod which is identified by the cross marks, there, and tell me what that is?
A. That is a grab-iron.
Q. That is a grab-iron?
A. Yes, sir.
Q. Is that the kind of a grab-iron you mean they have been equipped with?
A. Yes, sir.
Q. State whether or not it was customary on the engines that you saw to equip them with a pin-lifting rod, which could serve the purpose of a grab-iron?
A. It could not.

Mr. Brown: That is objected to. Wait a minute. All of the testimony on that subject, your Honor, is objected to for the reason I have stated as not being proper rebuttal testimony and a part of the case in chief, and besides the custom would have no bearing upon it, if as a matter of fact it might be for that purpose.

409 The Court: I have concluded that you have a right to show by qualified witnesses all about the custom concerning handholds on the back end of tenders. I don't remember what the last question was.

Q. State whether or not prior to June 9th, 1910, it was customary to equip the rear end of tenders of engines with a pin-lifting rod, which was suitable to be used and attached in such a manner that it could be used as a grab-iron?
A. No, sir.

Mr. Brown: That is objected to for the reasons stated, your Honor, when the question was asked before.
The Court: Objection overruled.
To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. They did not?
A. They did not.
Q. And what was it that prevented the people from using the pin-lifting rod as a grab-iron?
A. They were too close to a car, and a man with a glove on could not get a hold of them.

Mr. Brown: All of these questions are understood to be objected to, are they?
The Court: Yes.

Q. State whether or not the pin-lifting rod on the tenders of engines have a lateral movement?
A. They have.
Q. State whether or not it has a turning movement?
A. It will.
Q. State what effect that would have with reference to making it serviceable as a grab-iron?
A. It could not be used as a grab-iron in no way.
410 Q. State whether or not it was customary to equip the rear tender of engines with a ladder which could be used as a grab-iron?
A. No, sir.

Cross-examination by Mr. Brown:

Q. You are a switchman for the Great Western?
A. The Rock Island.
Q. How long have you been a switchman for the Rock Island?
—. Between four and five years.
Q. How long?
A. Between four and five years.
Q. Between four and five years?
A. Yes, sir.
Q. In the yards or on the road?
A. In the yards.
Q. Have you ever been on the road?
A. Yes, sir.
Q. For what company?
A. The Rock Island.
Q. Ever work for any other company?
A. No, sir.
Q. You are testifying to a general custom all over the country by what the Rock Island does?
A. Just giving testimony on the Rock Island road.
Q. All you know is what you do on the Rock Island, isn't it?
A. With what engines and what I have seen of several other engines around the Union Depot.
Q. A ladder could not be used as a grab-iron or hand-hold, could it?
A. No, sir.
Q. It would not be proper to use a ladder as a grab-iron or hand-hold?

A. No, sir.

411 Q. If the ladder came clear down to the end of the tender and had steps every six inches, you could not use it as a grab-iron?

A. No, sir; it would be right down in front of the draw-bar then.

Q. Suppose it was over to the side, you could not use it if it stood at the side, if it was a ladder, could you?

A. It would be in the way of the air hose then.

Q. Put it over on the other side then, stick it over there. You could not use it there, if there was no steam hose there, if it was a ladder, you could not use it?

A. If it was in the right place with a grab-iron attached, it may be used; could not be on the side of the engine or on the side of the draw-bars on either side.

Q. It could not be on either side of the draw-bar nor it could not be over here? (Indicating.)

A. No, sir.

Q. Of course the only grab-irons would be one on this side and one over there? (Indicating.)

A. That is what you call grab-irons.

Q. The one over here is right over the air hose?

A. No, sir.

Q. Where is the air hose located?

A. Right opposite the draw-bar on the right side.

Q. On which side is the air hose located?

A. On the right hand side.

Q. On which side is the steam hose located?

A. Supposed to be on the left-hand side.

Q. Then the air hose is located over here, isn't it? If that is the rear end, here, the air hose would be over here? (Indicating.)

A. That would be the right hand side.

412 Q. You could not have a grab-iron over there because it would be over the air hose, wouldn't it?

A. Not the way they build the engines; no, sir.

The Court: A little louder.

Q. It would be over the air hose, would be right above it?

A. It would be to the side of the air hose.

Q. Well, suppose the air hose went right down there, and suppose the grab-iron was two feet long, it would go right over it, wouldn't it?

A. You could not make a coupling of the air hose, if the air hose was any distance away from the grab-iron.

Q. I say a grab-iron of that kind would be over the air hose?

A. No, sir; it would not.

Q. Where would it be? Would it be under it?

A. It would be to the side of it.

Q. You tell the jury, do you, that a grab-iron located that way would be at the side of it? (Indicating.)

A. Yes, sir.

Q. If a grab-iron extended all the way from the coupling appa-

ratus over to the edge of the car, it would not be over the steam hose, would it?

A. I could not say about the steam hose, I never done no steam work.

Q. You don't know anything about the steam hose?

A. No, sir.

Q. Well, the air hose is located on that side (Indicating.) You have seen steam hose on them, have you not, on engines?

A. Not on freight engines; no, sir.

Q. You have seen them on freight engines then?

A. I have seen them on passenger engines.

413 Q. And you have seen how they hung down, haven't you?

A. They are not supposed to hang down; there are chains to keep them up.

Q. The air hose up, too?

A. No, sir.

Q. What is the difference between the air hose and the steam hose?

A. There is lots of difference, one is for air to stop the car with and the other for steam.

Q. What is the difference between them?

A. The steam hose is two or three times bigger than the air hose.

Q. Look at that on 45 and tell the jury if it is not four times as large? (Handing witness a photograph.)

A. No, sir.

Q. How much larger is it?

A. It it is about twice as large.

Q. Your estimation is, that it is twice as large as the air hose, is it?

A. Yes, sir; about twice as large.

Q. Now, the grab-irons that you are talking about, there was one located in the beam on one side of the coupler, and one located in the beam on the other side, wasn't there?

A. Yes, sir.

Q. About how long are the ones that you are talking about?

A. The grab-irons are supposed to be about eighteen inches long.

Q. Supposed to be about eighteen inches long, are they?

A. Yes, sir.

Q. Now, suppose in place of having just one grab-iron eighteen inches on that side, and one eighteen inches long on this

414 side, suppose you have one great long one that extended all the way across the end that stuck out just as far as the other one, and just the same size as the other one, but in place of going eighteen inches at either side, it went clear across, could you use it?

A. If it was a grab-iron you could use it.

Q. Suppose it was the same size of the grab-iron?

A. No, sir; not in that case; no, sir.

Q. Suppose we do not call it a grab-iron, just call it an iron rod that extended all along there?

A. If it was not a grab-iron, it would not be a grab.

Q. If it was not a grab-iron you could not use it as a grab-iron?

A. No, sir.

Q. Notwithstanding it may have the same size as a grab-iron, and put on just like a grab-iron and extends out as far as a grab-iron, but if it is not named a grab-iron, it would not be a grab-iron?
A. No, sir.
Q. That is your testimony?
A. Yes, sir.
Q. In order to make a grab-iron, you have to call it a grab-iron?
A. Yes, sir.
Q. And that is your view of it, isn't it?
A. Yes, sir.
Q. And then if a thing is not called a grab-iron, you cannot use it as a grab-iron?
A. No, sir.

Redirect examination by Mr. Parkinson:

Q. I hand you plaintiff's Exhibit "H," and ask you if the grab-irons are placed on the rear end of the tender, shown in that picture, in the place that it was customary for them to be placed in June, 1910, and prior thereto?
A. Yes, sir.

415 MILLARD C. SMITH, called as a witness on the part of the plaintiff, first being duly sworn, testified as follows:

Direct examination by Mr. Mytton:

Q. What is your name, please?
A. Millard C. Smith.
Q. And what is your occupation?
A. Car repairer.
Q. What company are you working for?
A. Working for the Burlington.
Q. How long have you been working as a car repairer for the Burlington?
A. Six years.
Q. Six years as a car repairer?
A. Yes, sir.
Q. Do you know what a grab-iron is?
A. Suppose to, yes, sir.
Q. Do you know what a hand-hold is?
A. Yes, sir.
Q. Do you know what a pin-lifter rod is?
A. Yes, sir.

416 Mr. Brown: I object to any evidence regarding a hand-hold or grab-iron or what the custom was for the reason that it is not proper rebuttal, and I would like to have the objection go to all the questions on that subject, so I will not have to object to it each time.

The Court: Very well; objection overruled.

To which ruling of the court the defendant at the time then and there duly excepted and still excepts.

Q. Look at the photograph marked Plaintiff's Exhibit "H," and state, please, Mr. Smith, whether or not you see any grab-irons in that picture? (Handing witness a photograph.)
A. I do.
Q. Whereabouts are those grab-irons?
A. On the side of the tank and on the end sill.
Q. On the side of the tank and on the end sill?
A. Yes, sir.
Q. Those which are upon the side of the tank—those are the perpendicular ones, are they?
A. Yes, sir.
Q. Do you call those grab-irons or hand-holds?
A. It is all the same.
Q. It is all the same?
A. Yes, sir.
Q. Now, where else do you see the grab-irons?
A. I see them on the end sill.
Q. You see them on the end sill?
A. Yes, sir.
Q. And on each side of the coupler?
A. Yes, sir.
Q. Do you see any other grab-irons in that picture?
A. I see four grab-irons.
417 Q. Do you see any others except those four grab-irons?
A. I do not.
Q. And what is this long iron instrument that runs horizontally across the back of that tank?
A. That is the pin-lifter.
Q. The pin-lifter?
A. Yes, sir.
Q. I will ask you, Mr. Smith, whether or not in June, 1910, and for three or four years prior thereto that you worked there, whether or not the equipment—whether the hand-hold, whether the pin-lifter rod was ever so that it could be used as a hand-hold?

418 Mr. Brown: That is objected to unless it applies to the St. Joseph and Grand Island Railroad, and applies to this car, your Honor.
The Court: Objection overruled.
To which ruling of the court the defendant at the time duly excepted and still excepts.

A. On freight cars that was not used for a hand-hold.
Q. Was not used for a hand-hold?
A. No, sir.
Q. Why was not the pin-lifting rod suitable for a hand-hold or grab-iron?
A. Well, they ain't properly equipped, most of them.
Q. And I say why was not this pin-lifter—why can't this pin-lifting rod be used as a grab-iron?
A. Because it is used for a—lifting the knuckle pin.
Q. Lifting the knuckle pin?

A. That is what it is used for.
Q. Can it be used as a grab-iron or hand-hold?
A. Well, it ain't supposed to be; it is not a grab-iron.
Q. It is not a grab-iron?
A. No, sir.
Q. What do you know in reference to its setting close to the car so that you cannot get your hand over it, whether or not it could be used as a grab-iron?

Mr. Brown: That is objected —, your Honor, as to what it may be on any other car except this particular car.
The Court: Objection overruled.
To which ruling of the court the defendant at the time duly excepted and still excepts.

419 Q. State, Mr. Smith, whether or not the cars were equipped with pin-lifting rods, which were attached so closely to the end of the tanks, that they could not be used as grab-irons?
A. I am not familiar with the tank in 1910.

Mr. Brown: We object to that.

Q. I am talking about the end of the cars.

The Court: Objection overruled.
To which ruling of the court the defendant at the time duly excepted and still excepts.

A. They are not all equipped that way, so you can use them, all of them.
Q. They are not?
A. No, sir.

Cross-examination by Mr. Brown:

Q. If they are equipped, of course, so that you can use them, that is, in other words, if the pin-lifting rod set out some four or six inches from the tender, and some two and one-half inches from the bottom, of course you could use it then as a hand-hold, couldn't you?
A. Why, they are not used as a grab-iron.
Q. I understand that. Of course you could not use anything as a grab-iron unless it was named a grab-iron and put there for that purpose, is that right?
A. I could not say. I never switched any.
Q. You don't know anything about that?
A. No, sir.
Q. In other words, if the grab-iron, in place of coming out here at either end and being eighteen inches in length or some-
420 thing like that, came out in this direction, came out and curved over and then came over—if in place of that, there should be some other device put on here for another purpose, but curved over at the other end, the same sized rod and put on in the same way, and the same distance from the tender, it could not

be a grab-iron or a hand-hold, unless it was put there for that purpose, would it?

A. I don't suppose it would be.

Q. You could not use it for a grab-iron or a hand-hold unless it had been put there for that purpose?

A. I could not answer that question; I don't know.

421 Q. Did you know that the rules and regulations of the Car Builders' Association provided that the coupler or unlocking rod when properly located and having a proper clearance around it is a suitable hand-hold, did you know that?

A. No, sir; I did not.

Q. You did not know that, did you?

A. No, sir.

Q. Well, that is not true though, as a matter of fact, is it, if the coupling rod is so located that it has a proper clearance around it, is it not a suitable hand-hold or grab-iron, is it?

A. Well, I would not think it would be.

Q. You would not think it would be. In other words, a thing that is not named a grab-iron or a hand-hold is not suitable for that purpose, is it?

A. Well, I don't think it would be.

Q. In other words, in order to have a thing that you can take a hold of and use it properly and suitably for a grab-iron or hand-hold, you would have to name it a grab-iron or hand-

422 hold, wouldn't you?

A. Well, a grab-iron is a grab-iron, and a pin-lifter is a pin-lifter.

Q. I understand. You say in order to use it as a grab-iron or hand hold, you would have to name it as a grab-iron or hand-hold?

A. Well, I suppose you would.

Q. You suppose you could use it as such?

A. Yes, sir.

Q. If a ladder extended down the end of the car or the center of the car, anywhere along there, and put there for the purpose of men climbing up the rear end of the car or on the tender, or anything of that character—and suppose it had rods extending across on it that was securely fastened, and was put there for a ladder, that would not be a hand-hold or grab-iron?

A. It depends on the location.

Q. I say, put there as a ladder, either side of the tender or in the center of the tender, and in either position, it would not be a grab-iron or hand-hold, would it?

A. It would not be a grab-iron.

Q. It would not be a hand-hold either, would it—it would not be a hand-hold, would it?

A. No, sir.

Q. Why, don't you know that a man in climbing a ladder has to take hold with his hands as well as his feet?

A. Yes, sir.

Q. Then it is a hand-hold?

A. A ladder is a ladder, and the other a hand-hold.

Q. While you are using one rod as a foot-hold, you are using the others up above it as a hand-hold, aren't you.

A. Well, they call that a ladder.

423 Q. They answer every possible, conceivable purpose of a hand-hold, don't they?

A. Yes.

Q. In other words, a hand-hold is anything the hand can get hold of conveniently, isn't it, isn't that right?

A. No, I don't think so.

Q. And is not a grab-iron, an iron that is located so a man can conveniently grab it?

A. A grab-iron is; yes, sir.

Q. So any kind of an iron that is located so a man can conveniently grab it is a grab-iron, isn't it?

A. Why, I don't know; no, sir.

Q. You don't know about that?

A. No, sir.

Q. A grab-iron and a hand-hold, that is the names that are used, they are used interchangeably, are they not?

A. Put that question again, please.

Q. I say, the names grab-iron and hand-hold are used interchangeably, are they not?

A. They are the same; yes, sir.

Q. In other words, a thing that is a hand-hold is a grab-iron?

A. Yes, sir.

Q. And a grab-iron is a hand-hold?

A. Yes, sir.

Q. And a hand-hold is a thing you can get a hold of with your hand, isn't it?

A. I don't know about that.

Q. You don't know about that?

A. No, sir.

Q. Did you know that in building cars and in equipping cars that the Master Car Builders' Association has prescribed that the coupler unlocking rod or any suitably located part of the car which does not exceed two inches on each side or in diam-

424 eter and has the proper clearance will be considered a suitable end hand-hold?

A. No, sir; I did not.

Q. You did not know that, did you?

A. No, sir.

Q. And yet you worked in the shops right under the specifications laid down by the Car Builders' Association, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir; have inspectors to look over the work.

Q. You have inspectors to look over it, but you are supposed to comply with the rules and regulations laid down by the Car Builders' Association, aren't you?

A. No, sir; it is in one that way all right, but say they would

mark out anything, they would say where to put it. We don't know whether it is in the regulations for sure.

Q. All you do is to put them on, is it?

A. Yes, sir.

Q. You know what the Car Builders' Association is, don't you?

A. Well, I suppose I do, something like it.

Q. It is an association of the head car men of America, isn't it?

A. Yes, sir.

Q. They get together and prescribe what is usually understood as a certain thing and what may be used in a certain way, isn't that right?

A. It seems to be a book of rules, in other words.

Q. And all cars are made, or it is intended to make cars to conform to each other, that is on all of the railroads, so far as appliances are concerned, so far as possible, isn't that right?

A. I think that is right.

425 Q. So that the rules and regulations of the Car Builders' Association applies not only to railroads, but it applies to all railroads, don't it?

A. Yes, sir.

Q. Now, don't you know that even at the present time in building cars at the present time or putting on the safety devices at this time—why, of course, you are governed by the recent rulings of the Interstate Commerce Commission, aren't you? You are, are you not?

A. Yes, sir, at the present time.

Q. And of course, that is different to what it used to be?

A. Some difference; yes, sir.

426 Q. Now, I will ask you the question again: I will ask you, if it is not a fact that if an uncoupling lever extends across the front end of a locomotive to within eight inches of the buffer beam, and is seven-eights of an inch or more in diameter, and is securely fastened with a clearance of two and one-half inches, if that is not considered a hand-hold?

A. Across the front end of the engine?

Q. Yes, sir; across the front end of the engine.

A. Yes, sir; it is.

427 Q. Is there any difference between the uncoupling lever which extends across the front end of the engine and the uncoupling lever which extends across the rear end?

A. Yes, sir.

Q. Of the tender?

A. Yes, sir.

Q. What is the difference?

A. They are differently equipped; put on different.

Q. Oh, you mean the one in front that sticks out further?

A. It sticks up higher, it is not the same as the back one.

Q. What I mean, it is the same size, isn't it?

A. Well, it is supposed to be, yes.

Q. Supposed to be the same size and works in the same way, doesn't it, exactly?

A. No, sir; it does not work in the same way.
Q. Doesn't it work from the lever at the side?
A. Yes, sir; from the lever at the side.
Q. And it is the same kind of a rod extending across?
A. Not exactly; no sir.
Q. About the same kind of a rod?
A. No, sir.
Q. What is the difference in it?
A. It is bent; it is two sections.
Q. I know. It is bent in the middle, is it not?
A. Bent in the middle yes, sir.
Q. But the other sections of it are just the same?
A. On the ends.
Q. The other sections are straight, are they not?
A. On the ends.
Q. Yes, sir.
A. Yes, sir.
428 Q. You know that is considered a hand-hold, don't you?
A. On the front end of the engine it is.
Q. It is not made as a hand-hold, it is made as an uncoupling lever?
A. It is made on the front end of the engine; there is no room to put a grab-iron on there.
Q. It is an uncoupling lever?
A. Yes, sir; on the front end.
Q. Now, that makes a good safe hand-holt, doesn't it?
A. Put on with bolts; yes, sir.
Q. Well, if it is securely put on, if it is fastened on to that?
A. On the front end of the engine it does; yes, sir.
Q. Makes a good hand-hold on the front end of the engine?
A. Yes, sir.
Q. If one was put on the rear end of the tender with the same clearance exactly, and just as tightly fastened, would it not be a good one?
A. Supposed to be grab-irons *or* the rear end.
Q. It would not be a good one on the rear end?
A. No, sir.
Q. Of course you could use it on the front end and get hold of it with safety, but it would not be a good one on the rear end?
A. No, sir.
Q. In other words, you cannot use anything on the rear end of the tender, unless called grab-iron or hand-hold?
A. I don't know whether you can't or not, but you don't.
Q. But you don't?
A. No, sir.
Q. If you were working around the rear end of a tender and you did not see a little short grab-iron there, eighteen inches in
429 length, but you did see a rod extending entirely across just the same size as the grab-iron and fastened on securely, you would not use it as a grab-iron, would you, if you did not have anything else to hold to?

A. Well, I don't know what I would do then.

Q. It would not be called a grab-iron and it would not be proper to use it?

A. Well, you would not use it.

Q. Just would not use it?

A. No, sir.

430 Mr. Parkinson: The plaintiff states that the purpose of introducing that exhibit is to show the location of hand-holds on the engine and explain the evidence of the witnesses as to the location of grab-irons or hand-holds on engines on and prior to June 9th, 1910. Plaintiff offers in evidence Exhibit "G."

The Court: For what purpose is that offered?

431 Mr. Parkinson: For the purpose of showing the location of grab-irons on the sills of engines and prior to June 9th, 1910.

432 The Court: Gentlemen, this picture is admitted as evidence, not to show or tend to show negligence on the part of the defendant or that it was under duty to locate grab-irons as indicated in the picture at the time this accident occurred, or to show whether that was so or not, but to explain to you the testimony of certain witnesses, who referred to this picture, and a lead-pencil mark "X" on one of the grab-irons, and testified as to the location of grab-irons on the end sill of tenders, when grab-irons were put on the end sills of tenders, to illustrate the location they said was customary when grab-irons were so located.

To which action and ruling of the court defendant then and there duly excepted and still excepts.

Said photograph is as follows:

(Here follows photograph marked page 433.)

#573 St J & Q. B Ry } Ⓟ 433.
Mmed



Plaintiff's Exhibit 6

434 Thereupon the defendant introduced the following evidence in sur-rebuttal.

Mr. FORREST, recalled as a witness on the part of the defendant, further testified as follows:

Direct examination by Mr. Brown:

Q. You testified yesterday, I believe, Mr. Forrest, or the day before?

A. The day before, Saturday.

Q. You were with the Great Western Railroad Company?

A. Yes, sir.

Q. Do you know Mr. Malone who was here yesterday at the Court House?

A. Yes, sir.

435 Q. Has he worked for your company?

A. Yes, sir.

Q. In what capacity?

A. Switchman.

Q. What engine does he work with?

A. Engine- 454 and 439.

Q. 454 and 439?

A. Yes, sir.

Q. I wish you would tell the jury whether or not there is any grab-irons of any kind or character upon engine 439, across the front end of the engine other than the pin-lifting rod?

A. No, there is not. The pin-lifter acts as a grab-iron.

Q. When did you see that engine?

A. Yesterday.

Q. Yesterday?

A. Yes, sir.

Q. Did you examine the engine after he testified, see the engine after he testifid?

A. I saw the engine last evening. I was over there at the round house.

Q. And who is Mr. Malone under, who is his foreman or boss?

A. Mr. Shoemaker, assistant superintendent; Mr. Beatty, the yard master, he is directly under.

The Court: Do you know how the back end of the tender of that engine is equipped?

A. Yes, sir. The pin-lifter on the back end, the engine is so constructed that it has got to be as far down as you can get it on the buffer beam in order to operate it, and there is a hand-railing across the back end in addition to that.

The Court: A hand grab-iron?

A. Yes, sir.

Mr. Brown: Can you use the pin-lifting rod on the rear end as a grab-iron at all?

A. No, sir.

436 Q. Tell the jury why you can't use it as a grab-iron?

A. It is so constructed, so you can't use it; it is laid right

down on top of the buffer beam, and it is impossible to use it as a grab-iron.

Q. Now, what is the difference in the equipment between the front and the rear end of the engine, so far as the pin-lifting rod is concerned?

Mr. Parkinson: We have gone all over that.

The Court: Objection overruled.

Q. What is the difference, if any, between the pin-lifting device on the front end of that engine and on the rear end?

A. Not any.

Q. Not any?

A. No, sir.

Q. Tell the jury what is the necessity for a hand-hold or grab-iron on the front end of the engine with respect to the necessity for it on the rear end.

A. Why, of course——

Mr. Parkinson: We object to that. The question of where they should be put is defined by law, and the necessity for it on the front end of the engine has nothing to do with it as compared with the rear end. The law says they must be put on the rear end.

The Court: Necessity is not the word. The question is, about their use?

A. It is on account of the construction of the engine.

Q. I mean in performing their duty for the company in coupling and uncoupling cars, what is the difference, with respect to coupling in front of the engine and behind a tender, if any?

A. Not any.

437 Q. Not any?

A. No, sir.

Witness dismissed.

J. E. KOERNER, called as a witness on the part of the defendant, first being duly sworn, testified as follows:

Direct examination by Mr. Brown:

Q. State your name, please?

A. J. E. Koerner.

Q. Mr. Koerner, what is your business?

A. I have charge of the car department for the Burlington.

Q. You have charge of the car department for the Burlington?

A. Yes, sir.

Q. How long have you had charge of the car department?

A. About four years or four years and a half.

Q. How long have you been a railroad man, about?

A. About 20 years.

Q. And how long have you worked for the Burlington Company?

A. All of that time.

Q. For twenty years?

A. Yes, sir.

Q. I will ask you, Mr. Koerner, if you know anything about whether the engines of the Burlington Railroad Company, the rear end of the tenders were equipped with hand-holds or grab-irons other than the pin-lifting rod or device, when it was so constructed that it could be used as a hand-hold or grab-iron prior to June 9th, 1910?

A. On the end sill?

Q. Yes, sir.

A. There was no other grab-iron.

Q. There was no other grab-iron?

A. No, sir; on a good many of them.

438 Q. Tell the jury if any of them had grab-irons on them. Why they had grab-irons on them? What was the construction of the pin-lifting rod in those cases?

A. Usually if there was not a good clearance on the pin-lifter rod there was a grab-iron placed there.

Q. Did you inspect any of your engines this morning or last evening down at the shops?

A. I inspected a few of them this morning.

Q. How many of them?

A. Twenty-three.

Q. Twenty-three of your engines?

A. Yes, sir.

Q. Tell the jury what proportion of those engines—I mean the tenders, the rear end of the tenders, had grab-irons on them, and what proportion did not have?

Mr. Parkinson: I object to that on the ground that we were not permitted to go into it, and it don't seem proper for them to object to our going into conditions at this time, and then go into it themselves, and we object to it.

439 The Court: If it is followed, it will be competent; objection overruled.

Mr. Brown: I will follow it up. Just state what proportion of those had grab-irons and what proportion did not have?

A. You are referring to grab-irons on end sills?

Q. On the end sills?

A. Yes, sir. There was eleven did not have grab-irons on the end sills out of the twenty-three.

Q. Out of the twenty-three?

A. Yes, sir.

Q. Now, tell the jury whether or not those ever had had grab-irons on them on the end sills?

A. To the best of my knowledge those eleven did not have or never had had grab-irons on the end sill.

Q. Now, the others that did have grab-irons, tell the jury whether they were put on before or after June 9th, 1910?

A. I could not say when those grab-irons were placed on the engines.

Q. Well, was it recently or otherwise?

A. It was rather recently.

Mr. Parkinson: We object to this speculating. He said he did not know.

The Court: Objection sustained.

Mr. Brown: He says, he don't know the exact date, your Honor.

The Court: Well, if he can tell before or since June 9th, 1910.

Q. What is your best impression as to whether before or since June 9th, 1910?

A. June, 1910?

Q. Yes, June, 1910?

A. I believe they were all put on since that date.

440 Cross-examination by Mr. Mytton:

Q. But you have seen many engines where they were on prior to that time, haven't you?

A. I cannot say that I have.

Q. You have seen some?

A. I cannot say that I have.

Q. Have you any recollection upon that point?

A. No.

Q. There may have been many engines that had those on prior to that time so far as you know at this time?

A. How is that question?

Q. You don't want to be understood by this jury for one minute and want this jury to understand that no engines in the Burlington Railway Company had grab-irons on the sills of engines prior to June 9th, 1910?

A. I cannot say whether they were or were not any on the engines prior to that time.

Q. Now, those eleven that have not got them on the sills, where are they?

A. There is one on the left hand side, upon the end of the tank.

Q. There is one——

A. That is one grab-iron on the left hand side upon the end of the tank.

Q. What kind of a looking grab-iron is it?

A. It is a regulation grab-iron.

Q. Does it run horizontally or perpendicularly?

A. Horizontally.

Q. Horizontally?

A. Yes, sir.

Q. Whereabouts would that grab-iron be on the tank? (Handing the witness a picture.)

A. There is none on that tank. The end ladder iron

441 there.

Q. Where would they come on those eleven that you are speaking of?

A. Right over here. (Indicating.)

Q. They would be right to the right hand-side of the——

A. The left hand side facing the tank—on the left hand side facing the coupler, there would be a grab-iron here. (Indicating.)

Q. And up here there would be a grab-iron there? (Indicating.)
A. Yes, sir.
Q. Is that where the pencil is along there now? (Indicating.)
A. Somewheres along in there. (Indicating.)
Q. Somewheres along in there? (Indicating.)
A. Yes, sir.
Q. And there would also be the perpendicular one, too?
A. Yes, sir.
Q. Now, do you know anything about here on this other side?
A. There is usually a ladder on that side.
Q. The ladder would be on this side?
A. On engines, if it ain't on the center there.
Q. But on those eleven that you spoke of, to the best of your recollection there was a grab-iron that was on the tank a little bit above the pin-lifting rod?
A. Yes, sir.
Q. And on a great many of them the ladder was on the right hand side of the tank instead of in the center of the tank?
A. To the best of my recollection the eleven had a ladder there on that side.
Q. That would be besides the pin-lifting rod?
A. Besides the pin-lifting rod.

442 Q. And whether or not those grab-iron that you have mentioned as being on the tank horizontally were placed there prior to June 9th, 1910, you don't know?
A. I don't know when those grab-irons would be placed there, but it has been the practice for a long time to put that grab-iron there. (Indicating.)
Q. When you say a long time, you mean how many years, about?
A. Well, for the last two or three years, anyhow.
Q. And yes, for the last ten or twelve years; since January 1st, 1895, when the law went into effect, you have seen many of them, shortly after that, they commenced putting them on there, didn't they?
A. I cannot recollect when the law called for that grab-iron.
Q. Well, but you know they have been placed upon there for several years prior to June 9th, 1910, don't you?
A. There may have been some of the engines had grab-irons placed there for some little time.

443 The above and foregoing was all the testimony offered in the trial of this case. At the close of all the evidence the defendant asked the court to give on its behalf instructions lettered A, B, C, D, E and F, which said instructions are as follows:

Number A.

If you believe from the evidence that the defendant's engineer did not back the engine up without a signal from the plaintiff, then your verdict will be for the defendant on both counts of the petition.

Number B.

The Court instructs you that under the law and the evidence, plaintiff cannot recover under the first count of his petition, and as to that count of the petition your verdict will be in favor of the defendant.

Number C.

The Court instructs you that under the law and the evidence plaintiff cannot recover under the second count of his petition, and as to that count of the petition your verdict will be in favor of the defendant.

Number D.

The Court instructs you that plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of any alleged defective condition of the coupler or coupling device attached to the rear end of defendant's tender.

444

Number E.

There is no evidence in this case from which you can find that the defendant was guilty of any negligence in having or maintaining the steam hose equipment described in evidence upon its tender, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by plaintiff on account of said steam hose equipment.

Number F.

The Court instructs you that there is no evidence in this case from which you can find that the defendant was guilty of any negligence in failing to have and maintain upon the rear end of its tender necessary and proper hand-holds or grab-irons for the use of plaintiff and its other employees, and plaintiff cannot recover any sum by reason of any alleged negligence of the defendant in failing to have and maintain necessary and proper hand-holds or grab-irons on the rear of its tender.

Which said instructions the court refused, and to which action of the Court in refusing said instructions and each of them, the defendant at the time objected, which objection was overruled by the Court and the defendant at the time then and there excepted to the ruling of the Court.

The Court, at the request of the plaintiff, gave instructions numbered from one to nine inclusive, which are as follows:

Instruction Number One.

The Court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common

carrier, engaged in interstate commerce by railroad, and
445 while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler designed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, and you find from the evidence that said tender was not provided with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand-hold on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in performance of his duties working in interstate commerce for defendant in coupling said tender to cars and was between the end of said tender and cars, and while in the exercise of ordinary care was, by reason of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between
the end of said tender and the end of cars, (provided you
446 so find) and because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, (provided you so find) and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, (provided you so find) run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition.

Instruction Number Two.

The Court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common carrier by railroad and engaged in interestate commerce between the states of Missouri, Kansas and other states, and that while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and you further find from the evidence that de-

fendant Company negligently maintained on the rear end of said tender a steam hose equipment reaching down to within a few inches of the surface of the track from the rear end and body of said tender, and that said steam hose equipment rendered said tender dangerous and unsafe for the use of defendant's employes in working around and about said tender in freight service, and that the defendant Company knew, or, in the exercise of ordinary care, should have known, that said steam hose equipment rendered said tender
447 dangerous and unsafe for employes working in, upon and about said tender, and you further find from the evidence that on said date William Temps and Norman Hawkins were the fireman and engineer in charge of said locomotive engine and tender, and in the employ of defendant, and working in interstate commerce, and you further find from the evidence that on said 9th day of June, 1910, in the town of Marysville, Kansas, at the point mentioned in evidence the plaintiff was in the employ of the defendant, and while in the performance of his duties, and in the exercise of ordinary care, and while employed by defendant in working in interstate commerce, was, by and on account of said steam hose equipment so negligently maintained on the rear end of said tender (provided you so find), and on account of the defendant Company and its engineer and fireman in charge of said engine backing said engine and tender without any signal from the plaintiff, (provided you so find) tripped and thrown to the ground and track and run upon, against and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the second count of his petition.

Instruction Number Three.

The Court instructs the jury that by "ordinary care," as used in these instructions, is meant such care as would be exercised by an ordinarily prudent person under the same or similar circumstances.

Instruction Number Four.

If the jury find for the plaintiff they will assess his damages at such sum as they may believe from the evidence will reasonably compensate him for the injuries sustained, if any, as shown by the evidence, and in estimating such damages the jury may take
448 into consideration the physical injuries to plaintiff, if any, as shown by the evidence, their nature and extent, and whether temporary or permanent, as shown by the evidence, the mental and physical pain and suffering the plaintiff has endured, if any, and will be reasonably expected to endure in the future, if any, as shown by the evidence, together with all the facts and circumstances detailed in evidence, not to exceed the sum of One Hundred Thousand Dollars.

Instruction Number Five.

The Court instructs the jury that although the burden of proof in this case is on the plaintiff to prove his case by a preponderance of

all the evidence in the case, yet you are further instructed that by a preponderance of the evidence is not meant the greater number of witnesses testifying, but such evidence as is more satisfactory and convincing to the jury.

Instruction Number Six.

The simple fact that a witness may swear to certain statements does not obligate the jury to accept such statements as true. You are the sole judges of the credibility of the witnesses and the weight you will give their testimony, but in determining the weight or credence you will give to the testimony of any witness, you should take into consideration the interest any such witness may have in the result of this suit, if any, the reasonableness or the unreasonableness of the statements made by such witnesses, the manner of the witness while upon the stand testifying, together with all the other facts and circumstances in evidence. You should view all the evidence in the light of reason and your common understanding of the affairs
449 of men, and you should give to the testimony of each and every witness just such weight and credence as you may deem it fairly entitled to under all the facts and circumstances in evidence, and if you believe that any witness has wilfully sworn falsely to any material fact in issue, you may discredit the whole or any part of such witness's testimony.

Instruction Number Seven.

You are instructed that this case is to be tried and your verdict rendered in accordance with the evidence introduced and the instructions of the court, without any regard to who is plaintiff and who or what is the defendant. The instructions, although read to you by the attorneys in the case, are the instructions of the court. They declare the law and the only law to govern you in your deliberations, and they must be considered and obeyed by you in arriving at your verdict.

Instruction Number Eight.

The Court instructs the jury that nine or more of your number agreeing may return a verdict, and if the verdict is concurred in by nine or more and less than twelve it will be signed by those agreeing to the verdict, but if the verdict is unanimous it will be signed by the foreman alone.

Instruction Number Nine.

The Court instructs the jury that if you find for the plaintiff upon both counts of his petition your verdict will be in the following form:

RALPH MOORE, Plaintiff,
vs.
ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, Defendant.

450 We, the jury in the above entitled cause, find for the plaintiff on the first count of his petition and assess his damages in the sum of —— Dollars.

And we find for the plaintiff on the second count of his petition and assess his damages in the sum of —— Dollars.

To the giving of said instructions and each of them the defendant at this time objected, and same objections were overruled by the Court, to which ruling of the Court defendant then and there excepted.

Thereupon the defendant asked the Court to give on its behalf instruction numbered One, as follows:

Number 1.

If you believe from the evidence that defendant's engine was moving or backing up at the time plaintiff stepped behind the rear end of the tender attached thereto, then he cannot recover any sum on account of the alleged negligence of defendant's agent and servants in charge of said engine in backing the same against, upon or over him.

The Court refused to give this instruction numbered one as above asked, and to the refusal of the Court to give said instruction as asked, the defendant at the time objected, which objection was overruled by the Court, and the defendant at the time then and there excepted to the ruling of the Court.

The Court modified said instruction by inserting in the fourth line from the bottom thereof the word "solely" between the words "sum" and "on," and gave the same as modified.

451 To the action of the Court in giving said instruction as modified the plaintiff and the defendant then and there duly excepted at the time.

Said instruction is as follows:

If you believe from the evidence that the defendant's engine was moving or backing up at the time plaintiff stepped behind the rear end of the tender attached thereto, then he cannot recover any sum solely on account of the alleged negligence of defendant's agents and servants in charge of said engine in backing the same against, upon or over him.

Thereupon the dfeendant asked the Court to give on its behalf instruction numbered 2, as follows:

Number 2.

If you believe and find from the evidence that the coupler attached to the rear end of the defendant's tender was not defective, that it worked automatically and that it could have been operated by plain-

tiff from the side or corner of the tender and without the necessity of his going upon or between defendant's railway tracks, or taking hold of said coupler with his hands to operate the same, then he cannot have a verdict under the first count of his petition, and as to that count of the petition your verdict will be in favor of defendant.

Which said instruction the Court gave on behalf of the defendant.

To the action of the Court in giving said instruction the plaintiff at the time duly excepted.

Thereupon the defendant asked the Court to give on its behalf instruction numbered 3, as follows:

452 Number 3.

The Court instructs you that at the time plaintiff was injured, the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons, for the greater security of its employees in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employees while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employees, while in the performance of their duties in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance of such work, then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employees, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender.

The Court refused to give this instruction numbered three
453 as above asked, and to the refusal of the Court to give said instruction as asked, the defendant at the time objected, which objection was overruled by the Court, and the defendant at the time then and there excepted to the ruling of the Court.

The Court modified said instruction by inserting in the seventh line from the bottom thereof the words, "and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars," between the words, "work" and "then," and gave the same as modified.

To the action of the Court in giving said instruction as modified,

both the plaintiff and the defendant then and there duly excepted at the time.

Said instruction, as modified, is as follows:

Number Three.

The Court instructs you that at the time plaintiff was injured, the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employees in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach
454 of defendant's employees while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employees, while in the performance of their duties, in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance of such work, and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars, then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employees, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender.

Thereupon the defendant asked the Court to give on its behalf instructions numbered four, five, six and seven, which said instructions and each of them were given by the Court on the behalf of the defendant, to which action of the Court in giving said instructions and each of them the plaintiff objected and duly excepted.

Said instructions are as follows:

Number 4.

Even if you should believe from the evidence that plaintiff was caught or thrown by reason of the steam hose equipment attached to defendant's tender, yet if you further believe that under the circumstances described in evidence the defendant was not guilty of any negligence in having or maintaining said steam hose equip-
455 ment upon its tender, then you cannot find for plaintiff in any sum on account of any injuries sustained by reason of

his being caught and thrown by said steam hose, if you should believe he was so caught and thrown.

Number 5.

The Court instructs you that you cannot find any fact in this case upon mere speculation or by guessing, but that each and every fact found by you must be found upon the credible evidence introduced in the case, and the Court further instructs you that the burden rests upon the plaintiff throughout the entire case to prove by the preponderance or greater weight of all the credible evidence to your reasonable satisfaction, each and every fact necessary to authorize a finding in his favor under the instructions of the Court, and unless he has proven such facts by such preponderance or greater weight of the evidence to your reasonable satisfaction, your verdict must be in favor of the defendant.

Number 6.

You are instructed that the rules of the defendant company prohibited the plaintiff from going behind defendant's tender while the same was in motion, to open or operate the coupling device attached thereto, and if you believe from the evidence that at the time he was injured he had gone behind defendant's moving tender for the purpose of opening or operating the coupling device thereon, then the defendant owed him no duty whatever with respect to the steam hose equipment upon the rear end of its tender, and plaintiff cannot recover any sum on account of injuries alleged to have been sustained by reason of his being caught or thrown by said steam hose equipment.

456 Number 7.

You are instructed that the only theory upon which plaintiff would be entitled to recover under the second count of his petition is that the agents and servants in charge of and controlling the movements of the engine and tender described in evidence negligently backed the same upon and over the plaintiff without a signal from him, and unless you believe from the preponderance of all the credible evidence that such agents and servants so controlling the movements of said engine and tender did negligently back the same upon and over the plaintiff at the time and place described in evidence, and without any signal from him, and that the backing of the engine caused or contributed directly to the injuries sustained by plaintiff, then your verdict will be in favor of the defendant on the said second count of plaintiff's petition.

Thereupon the defendant asked the Court to give on its behalf instruction numbered eight, as follows:

Number 8.

The Court instructs you that the defendant had the right to use its engine for both freight and passenger business and to have such

steam hose equipment or attachment upon the rear end of its tender as is usually and ordinarily attached to the tenders of the engines used for like or similar purposes by other railroad companies, and if you believe from the evidence that it was usual or customary for railroad companies using their engines for both freight and passenger business to have a steam hose equipment upon the rear end of their tenders like or similar to that used by the defendant, then the defendant was not guilty of negligence in having the steam
457 hose equipment described in evidence upon its tender, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by him on account of catching or stumbling over said steam hose.

The Court refused to give this instruction numbered eight, as above asked, and to the refusal of the Court to give said instruction as asked, the defendant at the time objected, which objection was overruled by the Court, and the defendant at the time then and there excepted to the ruling of the Court.

The Court modified said instruction by inserting in the third line from the bottom thereof the word, "solely," between the words "sum" and "on," and gave the same as modified.

To the action of the Court in giving said instruction as modified both the plaintiff and the defendant then and there duly excepted at the time.

Said instruction as modified is as follows:

Number Eight.

The Court instructs you that the defendant had the right to use its engine for both freight and passenger business and to have such steam hose equipment or attachment upon the rear end of its tender as is usually and ordinarily attached to the tenders of the engines used for like or similar purposes by other railroad companies, and if you believe from the evidence that it was usual or customary for railroad companies using their engines for both freight and passenger business to have a steam hose equipment upon the rear end of their tenders like or similar to that used by the defendant, then
458 defendant was not guilty of negligence in having the steam hose equipment, described in evidence, upon its tender, and plaintiff cannot recover any sum solely on account of any injuries alleged to have been sustained by him on account of catching or stumbling over said steam hose.

Thereupon the defendant asked the Court to give on its behalf instructions numbered nine, ten, eleven and twelve, which said instructions and each of them were given by the Court on the behalf of the defendant, to which action of the Court in giving said instructions and each of them, the plaintiff objected and duly excepted.

Said instructions are as follows:

Number 9.

The mere fact that plaintiff lost both his hands and was otherwise seriously injured while employed by the defendant as a brakeman,

is of itself no evidence whatever of defendant's negligence or liability in this case. Plaintiff's right to recover rests solely upon the alleged acts of negligence of the defendant named in plaintiff's petition, and unless he has proven such acts of negligence by the preponderance of the evidence, or a sufficient number thereof to authorize a finding in his favor under the instructions of the Court, and that such acts of negligence contributed directly to the injuries sustained by him, then your verdict must be in favor of the defendant.

Number 10.

Even if you should believe from the evidence that the defendant was guilty of negligence in maintaining the steam hose described in evidence upon its tender, or that it was guilty of negligence
459 in failing to provide necessary and proper hand-holds or grab-irons upon the rear end of its tender, yet if you further believe that such acts of negligence did not in any way contribute to the injuries sustained by plaintiff, then he is not entitled to recover any sum on account of such alleged acts of negligence.

Number 11.

The instructions read to you by the attorneys in this case are the instructions of the Court. They declare the law to govern your actions in this case. They are not to be disregarded by you at your pleasure, but they must be considered and obeyed by you in arriving at your verdict, and while your verdict must be found in accordance with such instructions and the evidence in this case, you are the sole judges of the weight of such evidence and the credibility of the witnesses. It is for you to say under all the facts and circumstances in evidence how much weight you will give to the testimony of any witness, but in determining this question you should take into consideration the reasonableness or the unreasonableness of the statements made by any witness, the interest any such witness may have in the result of this suit as shown by the evidence, together with all the facts and circumstances in evidence. The testimony of each and every witnss should be viewed by you in the light of reason and your common experience in the affairs of life. You should give to the testimony of each and every witness just such weight as you may deem it fairly entitled to under all the facts and circumstances in evidence, and if you believe that any witness has wilfully sworn falsely to any material fact in issue, you may disregard the whole or any part of such witness's testimony.

Number 12.

The Court instructs the jury that if you find for the de-
460 fendant, your verdict may be in the following form:

RALPH W. MOORE, Plaintiff,
versus
THE ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, Defendant.

We, the jury in the above entitled cause, find for the defendant.

The defendant requested the Court to instruct the jury as shown in instructions G, H, I and J, which are as follows:

Number G.

The Court instructs you that if you find from the evidence that plaintiff went behind defendant's tender while the same was in motion and backing up, then he cannot have a verdict in this case and the finding of the jury must be in favor of the defendant, regardless of any other fact or circumstance disclosed by the evidence.

Number H.

Even if you should believe from the evidence that the coupling device upon the rear end of defendant's tender was defective and that it could not be operated by employees with the pin-lifting rod or device described in evidence, yet if you further believe from the evidence that plaintiff went behind defendant's tender, knowing the same was in motion at the time, for the purpose of opening the coupler or operating the same, then he was acting in violation of the rules of the defendant company and was guilty of negligence in so doing.

Number I.

If you believe from the evidence that the defendant's ten-
461 der described in evidence was provided with reasonably necessary and proper hand-holds or grab-irons securely fastened for the greater protection of defendant's employees in coupling and uncoupling cars at the time plaintiff was injured, then plaintiff cannot recover any sum on account of any alleged negligence of the defendant in failing to provide and have necessary and proper hand-holds or grab-irons upon said tender.

Number J.

You are instructed that the defendant had the right to make and promulgate rules and regulations governing its business, and to govern the actions of its employees in the performance of their duties, and that it was plaintiff's duty to obey such rules and regulations of the defendant company.

Which said instructions the Court refused, and to which action of the Court in refusing said instructions, and each of them, the defendant at the time objected, which objection was overruled by the

Court, and the defendant at the time then and there excepted to the ruling of the court.

462 And thereafter, towit, on the 21st day of February, 1912, and after argument of counsel, the jury brought into open court the following verdict, which is in words and figures as follows, towit:

RALPH W. MOORE, Plaintiff,
versus
ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, Defendant.

We, the jury in the above entitled cause, find for the plaintiff on the first count of his petition and assess his damages in the sum of $25,000.00.

J. R. JENNINGS, *Foreman.*
G. W. JOHNSON.
J. R. SIMMONS.
J. V. MONAGHAN.
F. A. ANTERMEYER.
JAMES CROCKETT.
KIRK STANTON.
THOS. A. BAUBLITE.
A. L. ROYALTY.
SAMUEL BURTON.
J A. FULLER.

Thereafter, towit, on the 24th day of February, 1912, and during the January, 1912, Term of said Circuit Court of Buchanan County, Missouri, and within four days after the rendition of said verdict, the said defendant filed its motion for a new trial, which is in words and figures as follows, towit:

463 In the Circuit Court of Buchanan County, Missouri,
January Term, 1912.

RALPH W. MOORE, Plaintiff,
versus
THE ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant in the above entitled cause and moves the court to set aside the judgment rendered in said cause, and to award it a new trial therein, and for grounds of said motion the defendant says:

1.

The verdict is against the evidence and the weight thereof.

2.

The verdict is against the law as applied to the evidence in this case, and against the law as set out in the instructions given by the Court.

3.

The verdict is excessive and is the result of prejudice and passion upon the part of the jury.

4.

The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff over the objections of the defendant.

5.

The Court erred in excluding competent, relevant and ma-
464 terial evidence offered by this defendant.

6.

The Court committed error in permitting James W. Mytton, one of plaintiff's attorneys, while addressing the jury, to read to the jury portions of the depositions of witnesses who testified in the case in open court before the jury when such depositions and the parts thereof which were read to the jury had not been introduced in evidence, and when such portions of such depositions did not in any way tend to impeach, contradict or discredit the testimony given by such witnesses or any of them during the trial of this cause.

7.

The Court committed error in giving instructions numbered, one, two, three, four, five, six, seven, eight and nine, as requested by the plaintiff, over the objections of the defendant.

8.

The Court committed error in refusing to give instructions lettered A, B, C, D, E and F, in the nature of demurrers, requested by the defendant at the close of all the evidence in the case.

9.

The Court committed error in refusing to give instructions lettered A, B, C, D, E, F, G, H, I and J, requested by this defendant.

10.

The Court committed error in refusing to give instruction num-

bered one, as requested by the defendant, and in changing
465 and modifying the same and giving said instruction as modified, over the objections of the defendant.

11.

The Court committed error in refusing to give instruction numbered three, as requested by the defendant, and in changing and modifying said instruction and giving the same as so modified of its own motion, over the objections of the defendant.

12.

The Court committed error in refusing to give instruction numbered eight, requested by this defendant, and in modifying the instruction and giving the same of its own motion, over the objections of the defendant.

13.

Because plaintiff was guilty of misrepresentation and deceit in representing himself to be, and in testifying that his name is Ralph W. Moore, when as a matter of fact his true and correct name is Ralph W. Pugh.

14.

Because this defendant had prior to the trial of this cause and within the time prescribed by law, filed in this Court its petition and bond for removal of this cause to the United States District Court for the St. Joseph Division of the Western District of Missouri, and this Court was without jurisdiction to hear or try this cause.

15.

Because the several causes of action stated in plaintiff's petition were improperly united.

466 16.

The verdict of the jury is based upon the first count of plaintiff's petition, and if the finding was for the defendant upon the second count of the petition, the verdict of the jury is inconsistent and contradictory.

17.

Because there are two separate counts in plaintiff's petition and there was no finding by the jury upon the second count of the petition.

(Signed) R. A. BROWN,
Attorney for Defendant.

Thereafter, towit, on the 24th day of February, 1912, and during the January, 1912, Term of said Circuit Court of Buchanan County, Missouri, and within four days after the rendition of said verdict, the said defendant filed its motion in arrest, which is in words and figures as follows, towit:

In the Circuit Court of Buchanan County, Missouri, January Term, 1912.

RALPH W. MOORE, Plaintiff,
vs.
THE ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, Defendant.

Motion in Arrest.

Comes now the defendant in the above entitled cause and moves the Court to arrest the judgment rendered therein, and assigns as reasons or grounds therefor, the following:

467

1.

The petition of the plaintiff filed herein does not state facts sufficient to constitute a cause of action against this defendant.

2.

Upon the face of the record said judgment is erroneous and void.

3.

The Court had no legal jurisdiction of the defendant.

4.

The Court had no jurisdiction of the subject matter of this action.

5.

The several causes of action stated in plaintiff's petition filed herein have been improperly united.

6.

Plaintiff's petition sets up several causes of action stated in two separate counts, with a demand for damages on each count, and the verdict of the jury rendered herein on which said judgment is based, is upon the first count of the petition, without any finding for or against plaintiff or defendant upon the second count of the petition.

7.

Because plaintiff's petition contains two separate and distinct counts, and the finding of the jury is upon the first count of the

petition alone, making its finding upon the second count
468 in favor of the defendant, which is wholly contradictory to the finding of the jury upon the first count of the petition, and renders the jury's finding upon the first count null and void and in violation of the facts found by the jury under the second count.

8.

The verdict of the jury is against the law and evidence, and under the instructions of the Court, should have been for the defendant.

9.

Because the defendant had within the time prescribed by law filed in this court its petition and bond praying that the cause be removed to the United States District Court for the St. Joseph Division of the Western District of Missouri, and the cause being a proper one for removal under the facts stated in defendant's petition for removal, the Court was without jurisdiction to hear or determine the case.

(Signed) R. A. BROWN,
Attorney for Defendant.

Thereafter, towit, on the 6th day of May, 1912, and during the May, 1912, Term of said Circuit Court of Buchanan County, Missouri, said defendant's motion for a new trial coming on to be heard, was by the Court overruled, to which action of the Court in overruling said motion for a new trial, said defendant then and there objected and excepted at the time.

Thereafter, towit, on the 6th day of May, 1912, and during the May, 1912, Term of said Circuit Court of Buchanan County, Missouri, said defendant's motion in arrest coming on to be heard,
was by the Court overruled, to which action of the Court in
469 overruling said motion in arrest said defendant then and there objected and excepted at the time.

Thereafter, towit, on the 6th day of May, 1912, and during the May, 1912, Term of said Circuit Court of Buchanan County, Missouri, said defendant filed its affidavit for appeal, which is in words and figures as follows, towit:

In the Circuit Court of Buchanan County, Missouri, January Term, 1912.

RALPH W. MOORE, Plaintiff,
versus
THE ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, Defendant.

Affidavit for Appeal.

Comes now the above named defendant, the St. Joseph and Grand Island Railway Company, and prays the Court to grant it an appeal in this cause to the Supreme Court of the State of Missouri.

R. A. BROWN,
Attorney for Defendant.

STATE OF MISSOURI,
County of Buchanan, ss:

R. A. Brown, being first duly sworn, upon his oath says that he is the attorney of the above named defendant, The St. Joseph and Grand Island Railway Company, and as such is duly authorized to make this affidavit; that the appeal prayed for by the said defendant, The St. Joseph and Grand Island Railway Company, is not made for vexation or delay, but because this affiant considers said defendant, The St. Joseph and Grand Island Railway
470 Company, and said defendant considers itself aggrieved by the judgment and decision of the court herein.

R. A. BROWN.

Subscribed and sworn to before me this 6th day of May, 1912.
ROSS C. COX, *Clerk,*
By E. J. CROUSE, *D. C.*

Thereupon the Court granted said defendant an appeal to the Supreme Court of the State of Missouri, and for good cause shown and by agreement of parties the said defendant was given by the Court until during the October Term, 1912, in which to present and file its bill of exceptions herein.

And now, at the January Term, 1913, and within the time allowed that the above matters, things, rulings, and exceptions may be made a part of the record, the defendant presents to the Court, this, its bill of exceptions herein, and prays the Court that the same may be signed, sealed, filed and made a part of the record in this case, which is accordingly done this 27th day of February, 1913, and within the time heretofore allowed by the Court in which said bill of exceptions should be filed.

[SEAL.] WM. D. RUSK,
Judge of the Circuit Court of Buchanan County, Mo.

470a In the Supreme Court of Missouri, Division No. 1, October Term, 1915.

And thereafter, to-wit, on February 29th, 1916, the following further proceedings were had and entered of record in said cause:

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISDAND RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Buchanan County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Buchanan County rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows:

471 In the Supreme Court of Missouri, Division One, October Term, 1915.

#17221.

RALPH W. MOORE, Respondent,
v.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Moore, the respondent, instituted this action in the Buchanan circuit court under the Federal Employe-s' Liability Act (35 U. S. Stat. at Large, Chap. 149, p. 65; Fish v. Railroad, 263 Mo. l. c. 115, 116) for damages for personal injuries, and recovered judgment for $25,000.00 under a count of the petition alleging, among other things, that respondent's injuries were due to appellant's violation of those provisions of the Safety Appliance Acts requiring the attachment of grab-irons or hand-holds and the maintenance of automatic couplers in operative condition upon the rear of engine tenders, and to the fact that an engine and tender operated in a condition violative of the provision mentioned was negligently backed against and over him.

The facts bringing the case within the purview of the Federal Act are undisputed. Respondent offered testimony tending to prove the allegations of the petition, and the evidence by defendant tended to disprove those allegations and to prove contributory negligence, which appellant pleaded. Numerous assignments are relied upon for reversal. Further facts are stated in the course of the opinion.

I. The ruling denying the petition for removal to the Federal Court on the ground of diversity of citizenship was correct. K. C. So. Ry. v. Leslie, 236 U. S. l. c. 602, 603; Fish v. Ry., Supra, l. c. 116.

II. It is insisted the judgment cannot stand because, it is argued, the verdict is against the great weight of all the credible evidence in the case. The general rule on appeals in actions at law is that
472 if there is substantial evidence tending to support the verdict, the jury's view of the weight of the evidence is accepted by this court. A careful examination of the entire record satisfies us this assignment is an effort to overthrow a verdict on the ground it is against the weight of the evidence. Respondent's evidence clearly tended to prove the negligence alleged. It is not contended it did not do so except on the theory that it was so contradicted by appellant's evidence that its probative force was destroyed. In fact, however, some of the witnesses whose testimony is relied on as destroying respondent's evidence contradicted themselves. Some were contradicted by others of appellant's witnesses, and some contradicted physical facts tending to make out respondent's case and shown beyond dispute by photographs offered by appellant. In these circumstances the usual rule applicable in cases tried on conflicting evidence unquestionably applies, and the point is ruled against appellant.

The decisions cited to the contrary do not deal with cases such as this, wherein is presented but another example of conflicting evidence, with substantial evidence supporting the verdict. In those cases is found something inherently improbable in the evidence held insufficient.

III. Appellant introduced in evidence a rule which, among other things, forbade employes "to go between cars in motion to uncouple them" or "to engage in other dangerous practices."

On the trial, appellant contended respondent, in violation of this rule, went behind the tender while it was in motion in response to his own signal and that his doing so was the proximate cause of his injury. Respondent's counsel while cross-examining one of appellant's expert witnesses asked him whether it was not customary for employes to go between cars "to fix the knuckles" of couplers in case the pin-lifting rod would not work. The witness answered in the affirmative, and the admission of this testimony is asserted to be erroneous because it appeared the witness knew nothing of any violation of appellant's rule by its employes but answered from a general knowledge of railroads, not including appellant's.

473 The context shows the witness had already testified that when a pin-lifting rod was so constructed that it could be readily grasped by employes, no additional security was afforded by placing upon tenders and cars appliances designed to serve only as grab-irons and without any other function. It was while respondent's counsel were endeavoring to probe the grounds of this testimony that the question objected to was asked. The context discloses its purpose was simply to show that despite the equipment of cars and tenders with automatic couplers, occasions arose when it was necessary to go between the cars and to use the hands "to fix the knuckle." No mention of going between moving cars is made in the question or

answer and, consequently, the force of appellant's rule could not be affected. Further, respondent's violation, if any, of appellant's rule was at most but evidence of contributory negligence; and in this case, the action being founded upon violations of the applicable Safety Appliance Act, contributory negligence constitutes neither defense nor mitigation. Second Employe-s' Liability Cases, 223 U. S. l. c. 49, 50. There was no error in this ruling.

IV. Over appellant's objection the trial court admitted in evidence respondent's "Exhibit G," a photograph of the rear of a tender attached to one of appellant's engines of the class to which belonged the engine and tender by which respondent was injured. Witnesses had testified that the grab-irons shown upon the buffer-beam or end sill of the tender in the photograph were of the character and in the position in which it was the custom of railroads to place grab-irons upon tenders at the time and prior to respondent's injury in June, 1910. The photograph was by these witnesses declared to depict a correct placing of the grab-irons according to the then prevalent custom. In admitting the photograph, the trial court specifically stated it was admitted "for the purpose of explaining the testimony of certain witnesses, who said that prior to June, 1910, and at that time, engines had grab-irons on them attached to the end sill,
474 and that when they were so attached they were located as shown and marked in 'Exhibit G.'" In handing the exhibit to the jury, immediately thereafter counsel for respondent said: "Gentlemen, the court has admitted this photograph in evidence to illustrate and show to you gentlemen the location of hand-holds or grab-irons." On objection being made "to counsel making a statement to the jury," the trial court said to the jury: "Gentlemen, this picture is admitted in evidence, not to show or tend to show negligence on the part of defendant or that it was under a duty to locate grab-irons as indicated in the picture at the time this accident occurred, or to show whether that was so or not, but to explain to you the testimony of certain witnesses, who referred to this picture and a lead pencil mark 'X' on one of the grab-irons, and testified as to the location of grab-irons on the end sill of tenders, when grab-irons were put on the end sill of tenders, to illustrate the location they said was customary when grab-irons were so located."

The exhibit was clearly admissible for the purpose the court stated. Counsel does not contend to the contrary. Being admissible for one purpose, the fact it might not be admissible for others is not available as a means for its exclusion. In such circumstances instructions may be employed to limit the effect of the evidence offered. Union Savings Ass'n v. Edwards, 47 Mo. l. c. 449; Wilkins v. Ry., 101 Mo. l. c. 106.

V. Appellant insists the first instruction given for plaintiff is erroneous. That instruction was designed to present the law upon the issues under the first count of the petition, which was grounded upon non-compliance with the Safety Appliance Act relating to grab-irons and couplers. The instruction reads:

"The court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common

carrier, engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler designed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple
475 automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, and you find from the evidence that said tender was not provided with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand-hold on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in performance of his duties working in interstate commerce for defendant in coupling said tender to cars and was between the end of said tender and cars, and while in the exercise of ordinary care was, by reason of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars (provided you so find) and because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find) and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find) run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition."

It is insisted that neither pleadings nor evidence warranted this instruction; that it assumes facts in controversy and is in conflict with instruction three given for appellant.

(1) The first count of the petition alleges, in substance, and the evidence tends to show, among other things, that appellant negligently and unlawfully had in use an engine with a tender upon the end of which there were no secure grab-irons for the greater security of employes in coupling and uncoupling cars and upon which the automatic coupler was so out of repair that it could not be operated except by an employe going between the tender and cars; that re-

spondent in the performance of his duties in coupling went behind the tender, and appellant's servants negligently backed the engine against, upon and over him, and that by reason of these negligent acts respondent was injured.

476 Appellant's chief contention in this connection is that since the instruction did not require the jury to find that the engine was negligently backed against respondent it ignores one allegation of negligence and is erroneous for that reason. It is not perceived in what manner appellant could have been injured by the elimination from the instruction of one of the grounds authorizing, if proved, a recovery. It is indisputable that plaintiff was entitled to recover if the tender was not equipped with grab-irons and an operative automatic coupler in the manner required by the Safety Appliance Act and if the absence of these or either of them contributed to his injury, and this without regard to any question of contributory negligence. Grand Trunk Ry. v. Lindsay, 233 U. S. 48, 49. That he might also be entitled to rely upon negligence in backing the engine without signal could not defeat his right to rely upon concurrent and negligent non-compliance with the Safety Appliance Act, such non-compliance accounting for his presence in the course of duty behind the tender and largely diminishing the probabilities of his saving himself from injury as the tender moved against him, if respondent's evidence is to be believed. The jury evidently believed it.

(2) It is also contended the instruction assumes that the pin-lifting rod or uncoupling rod upon the rear of the tender was not a grab-iron within the meaning of the act requiring grab-irons. There is no doubt that an instruction assuming as true a material fact in controversy is erroneous. It is manifest, however, from reading the instruction that it contains no such assumption as charged, and neither analysis nor discussion is necessary to disclose the fact.

(3) An objection founded upon the asserted conflict between this instruction and instruction three given for appellant is based upon the contention that this instruction contains the erroneous assumption just adverted to. This objection falls with the previous one.

VI. One William Temps was a witness for appellant at the trial and had previously given his deposition. While on the stand
477 he was cross-examined as to certain answers he made when his deposition was taken. The questions and answers read to the jury were not the identical ones concerning which he was cross-examined, and on this a claim of error is predicated.

The contention cannot be sustained because (1) there is not a fact of the slightest consequence mentioned in the questions and answers read which is not included in the questions and answers in the deposition which the cross-examiner called to the witness' attention and the witness admitted were asked and answered as shown by the deposition; and (2) the testimony of the witness on the stand was in entire harmony with the questions and answers read. Appellant, in this connection, as appears from the cases cited in the brief, relies upon the rule that it is error to permit counsel to go outside the record and present to the jury extraneous matter of prejudicial char-

acter. The rule is inapplicable. As stated by appellant's counsel in his objection, the design of reading this matter from Temps' deposition was not to contradict him, since he had admitted testifying as disclosed by those parts of the deposition concerning which he was asked. The only rational purpose was to put before the jury exactly what Temps did say. The reading of these few questions concerning which Temps had not been specifically questioned was obviously due to respondent's counsel's honest but mistaken belief that Temps had been questioned concerning them. Had they differed in any material way from his testimony on the trial, another question would have been presented. They did not differ from it and no possible injury could have come to appellant from the mere fact that counsel read to the jury testimony which was in every possible material respect in the record before them out of the mouth of the witness counsel quoted.

VII. The rule is that when a jury returns a verdict upon one count of a petition this is equivalent to a finding against plaintiff on other counts concurrently submitted. From this rule appel-
478 lant argues the verdict is inconsistent in that the jury made no finding upon the second count, thereby impliedly finding against plaintiff on that count, and thereby finding against the truth of the facts in the second count, many of which were the same as those alleged in the count upon which the verdict was returned. It is argued that it results the two findings are in conflict and the verdict cannot stand. No case is cited which supports this contention. The cases cited announce the stated rule as to findings implied from silence in the verdict upon a single count when the case is submitted under several counts differently stating the same cause of action. The proposition advanced refutes itself. Such a rule as that contended for is contrary to precedents and practice and would preclude the employment of more than one count for the purpose of stating a cause of action in different ways to meet the exigencies of proof and would, in fact, for all practical purposes, partially repeal our statute which permits the joinder of causes of actions, and, as construed, permits one count to refer to another for facts common to both.

VIII. Among the instructions requested by appellant was instruction three, referred to above. This instruction the court modified and gave over the exceptions of both parties. With the clause added by the court, placed in parenthesis for purposes of identification, the instruction as given reads as follows:

"The court instructs you that at the time plaintiff was injured, the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employes in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold while in the performance of their duties in coupling and uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon

each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employes while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employes, while in the performance of their duties, in coupling and uncoupling cars, to readily grab hold of the
479 same for their better security while in the performance of such work (and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars), then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employes, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender."

It is contended this instruction imposed upon appellant duties (1) so to equip its tender as to render the act of coupling and uncoupling reasonably safe under all circumstances, and (2) to use the safest known appliances rather than the type approved by common usage in the business.

The instruction was error in appellant's favor. The applicable Safety Appliance Act provides: "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." The term "cars" includes "tenders." The act contains an absolute command. It is not satisfied by the use of reasonable care to equip cars as it directs. The equipment must be in place and in operative condition if the car is used in interstate commerce. C. B. & Q. Ry. v. United States, 220 U. S. 574 et seq. It does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance, so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission. The same act provided for automatic couplers which could be coupled and uncoupled "without the necessity of men going between the ends of the cars" and separately provided that "grab-irons or hand-holds" should be placed in the sides and ends of cars used in interstate commerce.

It is clear Congress intended to and did require both the automatic coupler, which included its uncoupling lever or pin-lifting rod, and, in addition, required grab-irons or hand-holds to be placed in
480 the ends and sides of cars. The instruction, therefore, was erroneously favorable to appellant in permitting the jury to exonerate it if it had failed to place grab-irons on its tender but had offered a substitute in the form of a pin-lifting or uncoupling rod. That the act did not contemplate such a substitution is clear from its terms. It has been so held by one Federal Court. United States v. Ry., 184 Fed. 94; United States v. Ry., 184 Fed. 99. Either automatic couplers, with their uncoupling levers, were in use and upon

cars when the applicable Safety Appliance Act was passed or they were not. If they were not in use, it is impossible that Congress had them in mind in requiring grab-irons in the end of cars. If they were in use, then the act clearly contemplated grab-irons in addition to them in order to afford employes "greater security" than was then afforded by whatever appliances were upon the cars. It is true there are decisions which construe the act otherwise, but the cases cited are in better accord with its language and the circumstances attending its passage.

Further, even if railroads may satisfy the act by using substitutes for grab-irons, it is not possible to believe the modification could have the meaning attributed to it by appellant.

Taken as a whole, as it must be, the instruction authorized the jury to exonerate defendant, so far as concerned the absence of grab-irons from the tender, if they found the pin-lifting rod was so constructed that it would easily be grasped and furnished employes security reasonable when compared with that which would have been afforded by the grab-irons had they been fixed in the end of the tender as the terms of the act required. The instruction told the jury that "any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold * * * was a hand-hold or grab-iron within the meaning of the law." That the jury could have construed the clause added by the court so to modify this explicit declaration as to require them, before finding for defendant, to find that the substituted device afforded
481 employes, in coupling and uncoupling cars, reasonable security or any degree of security from danger not incident to such work is inconceivable unless we are to assume the jury's intelligence was of a very low order. That assumption will not be made. The instruction was not misleading and contained no error against appellant.

IX. It is insisted the verdict is excessive. At the time he was injured, June 9, 1910, respondent was twenty-two years old, and was earning from $75.00 to $100.00 per month. Prior to that time his health had been excellent. As a result of his injuries he has lost both hands and one of his legs was broken and so injured that it is two and one half inches shorter than the other and its use much impaired otherwise. He suffered greatly as the immediate result of his injuries and still suffers therefrom. He is practically helpless, being unable even to feed himself. He is able to walk but little and that little is difficult and painful. His expectancy at the time he was injured was about forty years. His earning power is practically destroyed. He testified there was nothing he could do to earn anything and little effort was made to combat that testimony. In the very morning of life he is suddenly rendered helpless and subjected to tortures of both body and mind which are hardly to be described. Scullin v. Railroad, 184 Mo. l. c. 709; Markey v. Railroad, 185 Mo. l. c. 364, et seq.; Hill v. Power Co., 260 Mo. l. c. 43; Lessenden v. Ry. 238 Mo. l. c. 266, 267; Yost v. Railroad, 245 Mo. l. c. 252, 253. The affirmance of judgments for $20,000.00 for the loss of both legs is not unusual in this court. Such an infliction leaves many occu-

pations open to the victim. The loss of both hands more seriously diminishes earning power, nearly or practically destroying it, and entails much greater expense in the matter of personal attendance necessitated by the helplessness resulting from such an injury. The judgment is not excessive.

482 X. Other errors are assigned but a careful examination of them all in the light of what has been said discloses no prejudice to appellant's rights. The case was well tried, and the verdict is in just accord with the grievousness of the injuries inflicted. The judgment is affirmed.

All concur except Woodson, J. not sitting.

JAMES T. BLAIR, *J.*

483 In the Supreme Court of Missouri.

And thereafter, to-wit, on March 8th, 1916, the following further proceedings were had and entered of record in said cause:

"RALPH W. MOORE, Respondent,
vs.
ST. JOS. & GRAND ISLAND RAILWAY COMPANY, Appellant.

Comes now the said appellant, by attorney, and files its motion for a rehearing herein."

And thereafter, to-wit, on March 9th, 1916, the following further proceedings were had and entered of record in said cause:

"RALPH W. MOORE, Respondent,
vs.
ST. JOSEPH & GRAND ISLAND RY. CO., Appellant.

Comes now the said appellant, by attorney, and files its motion to transfer this cause to the Court in Banc."

And thereafter, to-wit, on March 30th, 1916, the following further proceedings were had and entered of record in said cause:

"RALPH W. MOORE, Respondent,
vs.
ST. JOSEPH & GRAND ISLAND RY. CO., Appellant.

Now at this day, the court having fully considered and understood the motions of the said appellant for a rehearing herein and to transfer this cause to the Court in Banc, doth order that said motions be, and the same are hereby overruled."

484 Which said motion to transfer to Court in Banc, is in words and figures as follows:

In the Supreme Court of the State of Missouri, October Term, 1915.

No. 17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Motion to Transfer.

Robert A. Brown, Attorney for Appellant.

485 *In the Supreme Court of the State of Missouri.*

In the Supreme Court of Missouri, October Term, 1915.

No. 17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Motion to Transfer.

The appellant asks that this case be transferred to court en banc, and as grounds therefor states:

I.

Respondent in his petition alleged violations of the Safety Appliances Act by appellant, which he alleged resulted in respondent's injury.

486 A federal question being involved in the construction of the Safety Appliances Act, appellant filed in the Circuit Court of Buchanan County, Missouri, its petition and bond, praying a removal of this cause to the Federal Court. The petition being denied the case was tried in the Circuit Court of Buchanan County, Missouri.

Appellant states that inasmuch as a federal question is involved, the case should, if it so requests, under Section 4 of the Amendment of 1890, to Article VI, of the Constitution of the State of Missouri, be transferred to court en banc, and appellant asks that the case be so transferred in accordance with such provision of the Constitution.

II.

Respondent in his petition alleged that appellant had been guilty of negligence in failing to have proper grab irons attached to the rear end of its tender, in accordance with the Act of Congress commonly known and designated as the "Safety Appliances Act." It therefore became necessary in the trial of the cause for the trial court

to construe said Act of Congress, with respect to the character of grab irons which should be used, in accordance with the provisions thereof, and the court did so construe said act of congress in the giving of instructions on behalf of respondent, and especially in the giving of respondent's instruction numbered one, which attempted to define the character of grab irons provided for by such act of congress.

487 The court also, in giving instruction numbered three on behalf of the appellant as modified by the court, again defined the character of grab irons provided for by the act of congress.

Appellant states that in the construction of said Safety Appliances Act a federal question was and is involved, and that under said Section 4, of the Amendment of 1890 to Article VI, of the Constitution of the State of Missouri, the case should if requested by appellant, be transferred to court en banc, and appellant prays an order of the court so transferring the same.

III.

Respondent in his petition alleged that at the time he was injured he was engaged in interstate commerce. It therefore became necessary for the trial court to construe the acts of congress relating to persons injured while engaged in interstate commerce; that such questions were federal questions, and that by reason of the federal questions involved appellant is entitled to have this case transferred to court en banc, under Section 4, of the 1890 Amendment of Article VI, of the Constitution of the State of Missouri, and appellant prays an order of the court transferring this case to court en banc, in accordance with such provisions of the Constitution.

Respectfully submitted,

ROBERT A. BROWN,
Attorney for Appellant.

488 Which said motion for rehearing is in words & figures as follows:

In the Supreme Court of the State of Missouri, October Term, 1915.

No. 17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Motion for Rehearing.

Robert A. Brown, Attorney for Appellant.

489 In the Supreme Court of the State of Missouri, October Term, 1915.

No. 17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Motion for Rehearing.

The appellant, The St. Joseph & Grand Island Railway Company, prays the Court to grant it a rehearing in this case, and as grounds therefor states:

I.

The Court has overlooked the fact, duly submitted by counsel, that respondent sought to recover under the first count of his petition upon specific and positive allegations to the effect that he went behind a tender attached to one of appellant's engines when the engine and tender were stationary, for the purpose of attempting to open the knuckle attached to the tender, which had become defective to such an extent that it could not be opened with the pin
490 lifting rod and other appliances, and that while in the act of opening the knuckle with his hands the engine and tender were suddenly backed upon and over him without any signal having been given by him for the backing of the engine.

Respondent testified in the most positive manner that the engine and tender were stationary when he went behind the tender, and that while attempting to open the knuckle with his hands the engine and tender were backed over him without any signal having been given by him to back the engine, and that as a result of the backing of the engine he was caught and mangled.

We had believed the law in this state to be definitely and finally settled to the effect that if a plaintiff recover he must recover under the allegations of his petition and the proof adduced in support thereof.

Certainly it does not need argument to establish the fact that the

defective coupling apparatus could not of itself have injured respondent, and it is equally certain that the alleged lack of grab irons could not have injured respondent or in any way contributed to his injury, unless the engine backed upon him or was moving when he stepped behind the tender. Respondent at no time contended or pretended that he could have been injured had it not been for the fact that appellant's engine was negligently backed in the manner described by him. He did not allege in his petition that he went behind
491 the tender while it was in motion, and that he had a right so to do in the performance of his duties, nor did he testify to any such facts. His evidence followed the allegations of his petition. In that respect at least he was consistent.

If it be conceded that the coupling apparatus was defective and that the tender was not properly equipped with grab irons, it must nevertheless be evident that the backing of the engine was the proximate cause of the injuries sustained by respondent. In any event it was one of the contributing causes and respondent's petition stated no cause of action, unless the allegation of the negligent backing of the engine be coupled with the allegations of a defective coupling apparatus and the lack of grab irons. It took the combined allegations of negligence to make out a cause of action against the appellant.

Under the allegations contained in respondent's petition, and under the proof adduced in support thereof, was the trial court justified in submitting to the jury the question as to whether respondent was injured or could have been injured by the alleged defective coupling apparatus and on account of lack of proper grab irons, without submitting to the jury the question as to whether appellant's engine was negligently backed upon him? In other words was the court justified in submitting to the jury the question as to whether the alleged defective coupling device could have injured respondent, in the absence of any other showing of negligence upon the part of appellant? We respectfully
492 submit that in order to justify such action upon the part of the trial court the law of negligence in this state must be changed, and yet that is exactly what the trial court did, and what this court has said the trial court was justified in doing.

Respondent's instruction numbered one declared the law to be just what I have endeavored to show the court the law is not and never has been. The instruction told the jury that if they believed from the evidence that respondent, while in the exercise of ordinary care, went behind appellant's tender for the purpose of opening the coupling apparatus attached thereto which had become defective and would not couple automatically and that if appellant had failed to have its tender properly equipped with grab irons as provided by law and that while so engaged he was run upon and over by appellant's tender and engine then the verdict of the jury should be for the respondent on the first count of his petition.

The instruction left the jury free to find that defendant's engine and tender were moving at the time respondent went behind the

tender and this in spite of the allegations of his petition and his own solemn sworn statements to the contrary. We are not now arguing that respondent might not have stated a cause of action had he alleged that he went behind the tender while it was in motion for the purpose of opening the defective coupling apparatus, and that while so engaged he was injured. We are merely stating that under the law, as heretofore declared by the
493 appellate courts of this state, respondent could not allege that the accident occurred in one way, and support the allegations of his petition by his own solemn testimony, and then be permitted to come into court and recover upon an entirely different theory, even though this different theory be supported by the evidence of the appellant. We believe the law to this effect is well settled in this state.

Judge Valliant in the case of Behen vs. Transit Company, 186 Mo. 430, said:

"Before the plaintiff in this case can avail himself of the defendant's testimony * * * he will have to confess that all of the evidence adduced in his behalf was untrue, * * * and that only that part of defendant's testimony that suited the plaintiff's case was worthy of belief. A party will not be allowed to take such a position."

In the case of Milliken vs. Com. Co., 202 Mo. 637, l. c. 654, it is said:

"It is a well established rule of pleading that a party cannot state one cause of action and recover on a different one."

Again this court in the case of Koenig vs. U. D. Ry., 173 Mo. 698, l. c. 724, said:

"This instruction is vicious because of the fact of its not being in accord with the allegations of the petition upon which the case was submitted to the jury."

The rule is again stated in the case of Black vs. Railroad, 217 Mo. 672, as follows:

494 "A court does not possess the power to change by instruction the issues which the pleadings permit."

We must believe that the above authorities were overlooked and that the viciousness of respondent's instruction was not fully realized by the court.

Again we wish to call to the court's attention the error committed by the trial court by amending appellant's instruction number three by inserting therein the following words:

"And that said attachments or devices furnished reasonable security to the employes of the appellant in coupling and uncoupling said tender and cars."

The law did not obligate the appellant to provide grab irons which would furnish reasonable security to its employes in coupling and uncoupling cars. Section four of the Safety Appliances Act provides that grab irons shall be furnished "for greater security of men in coupling and uncoupling cars."

We cannot believe that the language of the Act as quoted, contemplates that a railroad company shall so equip its cars with

grab irons as to render the work of coupling and uncoupling cars reasonably safe. It is always a hazardous undertaking to couple and uncouple cars, and especially is this so when it becomes necessary to go between cars to perform this service. This being true, we repeat that it can not be possible that Congress intended to provide that railroad companies should provide grab irons of such character, and so located, as would render the work reasonably safe. We do not believe that the law imposes or was ever intended to impose any such burden upon railroad companies. It is possible to provide grab irons that will give "greater security to men in coupling and uncoupling cars," but it is not possible to provide grab irons which will render such hazardous work reasonably safe.

495

We are constrained to believe that this point which we urged with so much confidence in our brief was overlooked by the court, or that it was so feebly presented as not to impress the court with its importance.

III.

When the trial court told the jury that it might return a verdict for respondent in any sum not exceeding "the sum of one hundred thousand dollars," it thereby injected into the case a venomous poison for which there was no antidote. The court thereby said that it would affix its stamp of approval upon any verdict which the jury might return under one hundred thousand dollars. Respondent was grievously injured, and the jury needed no encouragement from the court to arouse their sympathies and prejudices, and to stimulate their imaginations. This court has said that it is wrong to give such instructions, and that the court was right when it made this statement, is evidenced by the judgment returned by the jury in this case. No verdict of so large an amount has ever been approved by this court in any other case of a similar character.

496

Believing, as we, do, that under all the circumstances surrounding this case we were entitled to have a verdict from a jury uninfluenced by judicial hint or approval, we urge upon the court that it again place its stamp of disapproval upon this character of instruction, and that it give to this appellant an equal chance under the law to establish its rights before a jury uninfluenced by any opinion or suggestion from the trial court as to what would be a reasonable verdict, in the event the jury should again find in respondent's favor.

The case of Lessenden vs. Railroad, 238 Mo. 247 and Appelgate vs. Railroad, 252 Mo. 173, cited in our brief and quoted from at length, were evidently overlooked by the court, and in our very humble opinion they should be conclusive as to appellant's right to have the judgment and decision of the trial court set aside and a new trial granted to it.

Respectfully submitted,

ROBERT A. BROWN,
Attorney for Appellant.

497 In the Supreme Court of Missouri, Division No. 1, October Term, 1915.

And thereafter, to-wit, on April 5th, 1916, the following further proceedings were had and entered of record in said cause.

"RALPH W. MOORE, Respondent,
vs.
ST. JOSEPH & GRAND ISLAND RY. CO., Appellant.

Come- now the said appellant, by attorney, and files its motion to transfer this cause to the Court in Banc."

And thereafter, to-wit, on June 2nd, 1916, the following further proceedings were had and entered of record in said cause:

"RALPH W. MOORE, Respondent,
vs.
ST. JOSEPH & GRAND ISLAND RY. CO., Appellant.

Now at this day the Court having considered and fully understood the motion of said appellant to transfer this cause to the Court in banc doth order that said motion be, and the same is hereby overruled."

498 Which said motion to transfer to Court in Banc is in words and figures as follows:

In the Supreme Court of the State of Missouri, October Term, 1915.

No. 17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Motion to Transfer.

Robert A. Brown, Attorney for Appellant.

499 In the Supreme Court of the State of Missouri, October Term, 1915.

No. 17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Motion to Transfer.

The appellant asks that this case be transferred to court en banc, and as grounds therefor states:

I.

Respondent in his petition alleged that while employed by appellant in interstate commerce he was injured while in the performance of his duties, and he sought to recover damages for such injuries by reason of the provisions of an Act of the Congress of the United States, commonly known and designated as the Safety Appliances Act, and by reason of the provisions of another Act of the Congress of the United States, commonly known and designated as the Federal Employers' Liability Act. Federal
500 questions thus being involved appellant timely filed in the Circuit Court of Buchanan County, Missouri, where this cause was then pending, its petition and bond praying a removal of this case to the District Court of the United States for the St. Joseph Division of the Western District of Missouri. The petition was denied and the case was tried in said Circuit Court of Buchanan County, Missouri.

Appellant states that inasmuch as federal questions were raised in respondent's petition and in appellant's petition for removal, the case is, under Section 4, of the amendment of 1890 to Article VI of the Constitution of the State of Missouri, transferrable to court en banc, and appellant asks that the case be so transferred in accordance with such provision of the Constitution.

II.

Respondent in his petition alleged that while the appellant was engaged in interstate commerce, and while respondent was engaged in such interstate commerce for appellant, he sustained certain injuries by reason of the fact that appellant had been guilty of negligence in failing to provide upon the rear end of one of its tenders, around and with which respondent was engaged in the performance of his duties, proper hand holds, or grab irons, or any hand holds or grab irons, and by reason of the further fact that the coupling device upon said tender was defective and respondent sought to recover damages from appellant by virtue of the provisions of a certain Act of the Congress of the United States, commonly known and designated as the Safety Appliances Act, which provides among other things the character of grab irons or hand holds which railroad companies shall provide for the use
501 of their employes, and that couplings must not be defective. Respondent also sought to recover damages for the injuries sustained by him by reason of the provisions of a certain Act of the Congress of the United States, commonly known and designated as the Federal Employers' Liability Act. During the trial of this cause it became necessary for the trial court to construe said Acts of Congress, and they were so construed by said court in the instructions submitted by the court to the jury.

Appellant states that on the appeal in this case it became necessary for this court to review the instructions of the trial court, and to construe the Acts of Congress above referred to, and that this

court did so review said instructions and did construe said Acts of Congress, and that it defined the character of grab irons required by Congress to be used; that in the giving and reviewing of said instructions, and in the construction of said Acts of Congress, federal questions were, and are involved, and that under said Section 4, of the amendment of 1890 to Article VI of the Constitution of the State of Missouri, the case is transferrable to court en banc, and appellant prays an order of the court so transferring the same.

Respectfully submitted,

ROBERT A. BROWN,
Attorney for Appellant.

And thereafter to-wit on June 12, 1916, the following further proceedings were had in said cause, to-wit:—

502 In the Supreme Court of Missouri, April Term, 1916.

(No. 17221.)

RALPH W. MOORE, Respondent (D. E.),
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant (P. E.)

Now at this day there are presented to Hon. Robert F. Walker, Acting Chief Justice of the Supreme Court of the State of Missouri, in chambers, by The St. Joseph & Grand Island Railway Company, respondent, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, an assignment of errors, and a citation to the said respondent, (D. E.) citing and admonishing him to be and appear at the Supreme Court of the United States within thirty days from the date thereof; which said writ of error is allowed, said assignment of errors ordered filed, and said citation signed.

It is further ordered that, upon the said defendant (plaintiff in error), The St. Joseph & Grand Island Railway Company, filing with the Clerk of this Court, within twenty days from this date, a good and sufficient bond in the sum of Fifty Thousand Dollars, conditioned to the effect that if the said defendant The St. Joseph & Grand Island Railway Company, plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and virtue, the said bond to be approved by the clerk of this court, or a judge thereof, that all further proceedings and process of this court be, and they are hereby, suspended and stayed, until the determination of said writ of error by the said Supreme Court of the United States.

503 Which said petition for a writ of error is in words and figures as follows:

The Supreme Court of the State of Missouri.

No. 17221.

RALPH W. MOORE, Plaintiff,
versus
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Defendant.

To the Honorable Robert F. Walker, Acting Chief Justice of the Supreme Court of the State of Missouri:

The petition of The St. Joseph & Grand Island Railway Company, a corporation, with its principal office or place of business in the City of St. Joseph and State of Missouri, respectfully shows:

1. Heretofore, and on or about the third day of February, 1911, an action was commenced in the Circuit Court of Buchanan County, in the State of Missouri by Ralph W. Moore, plaintiff, against your petitioner, The St. Joseph & Grand Island Railway Company. In plaintiff's petition it was alleged that the defendant was a railroad company engaged in operating a line of railroad through the States of Nebraska, Kansas and Missouri, and that as such railroad company it was engaged in interstate commerce; that on or about the
504 ninth day of June, 1910 the defendant, while in the State of Kansas and while carrying interstate commerce, had attached to one of its engines a tender, upon which the coupling device was defective to such an extent that it would not couple automatically by impact, and that there were no grab-irons or hand-holds upon the end of the tender for the protection of defendant's employes while in the performance of their duties around the end of the tender; that on the said ninth day of June, 1910, while the plaintiff was employed by the defendant, and while he was engaged in interstate commerce, it became his duty to go behind defendant's tender for the purpose of opening the coupling device thereon with his hands in order that the tender might be coupled to a freight car; that while he was in the act of opening the coupling device defendant's engine and tender were backed upon and over him without any signal having been given by him for the movement of said engine and tender; that by reason of the backing of said engine, and by reason of the fact that the coupling device was defective in the manner above described, and by reason of the further fact that there were no grab-irons or hand-holds in the end of defendant's tender, plaintiff was thrown to the ground and run over by defendant's tender, thereby causing both of his hands to be amputated and causing him.
505 to receive other serious and permanent injuries, for which he sought to recover the sum of one hundred thousand dollars.

2. After the filing of plaintiff's petition, and before defendant had made answer thereto and before it was required to make such answer under the laws of the State of Missouri, and on the first day of May, 1911, it filed in such Circuit Court of Buchanan County, Missouri its petition for removal, in which it was alleged that the matter and amount in dispute exceeded the sum of two thousand dollars, ex-

clusive of interest and costs; that plaintiff's suit was begun in the Circuit Court of Buchanan County on the third day of February, 1911 by filing his petition in the office of the Clerk of said Circuit Court, and by serving upon the defendant a writ of summons; that said cause was still pending and undetermined, and that the May Term, 1911 of said Court was the first term at which said cause could be tried; that the defendant had not answered nor pleaded to the petition of plaintiff and that it was not required so to do until the first day of May, 1911; that the controversy was wholly between citizens of different states; that the defendant was a corporation organized in and chartered by the States of Kansas and Nebraska; that it then was a resident of said State of Kansas and Nebraska, and that it was not at the time of the accident, nor was it then a citizen or resident of the State of Missouri; that plaintiff was at the time of
506 the commencement of the cause of action and that he still was, and at all times had been, a citizen and resident of the State of Missouri.

The allegations contained in plaintiff's petition were then set out in said petition for removal, and your petitioner then further alleged that the cause of action stated in plaintiff's petition, if any, was based upon and in pursuance of the statutes and laws of the United States of America, and particularly in pursuance of the Act of Congress of April 22, 1908, and acts pursuant thereto and amendatory thereof, for the determination of the liability of common carriers by railroad to their employes for injuries received by such employes while in the service of such common carriers and while engaged in interstate commerce; that the only cause of action which plaintiff had, if any, was by virtue of the aforesaid laws of the United States.

Your petitioner in said application for removal then offered a bond with good and sufficient surety for its entering into the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, on the first day of the next term session, a copy of the record in said cause, and for paying all costs which might be awarded by said Circuit Court if said court should hold that said cause was wrongfully or improperly removed.

507 Your petitioner then prayed that said Circuit Court proceed no further in said cause, except to make the order of removal required by law and to accept said bond and surety and to cause the record herein to be removed into said Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri.

On the twenty-seventh day of May, 1911 your petitioner's application for removal was denied by said Circuit Court of Buchanan County, and thereupon, and on the twenty-seventh day of July, 1911, and during the May Term, 1911 of said Court, your petitioner presented a term bill of exceptions taken by it to the action of the Court in denying the petition to remove the cause to the United States Court, which was duly allowed, signed, sealed and filed as a part of the record.

3. Thereafter, and on or about the sixteenth day of November, 1911, the said plaintiff filed in said cause an amended petition or complaint in two counts, in the first count of which he alleged in

substance that the defendant was a corporation engaged in operating as a common carrier a line of railroad to and through the States of Missouri, Kansas, Nebraska and other states, and to and through the towns of Hanover, Marysville and Hiawatha in the State of Kansas and into the City of St. Joseph in the State of Missouri,
508 and that the defendant as a common carrier was engaged in interstate commerce; that on the ninth day of June, 1910 it owned and operated as a part of one of its trains running in interstate commerce a freight tender attached to its engine, without providing said tender with secure grab-irons or hand-holds in the end thereof for the security of the defendant's employes in coupling and uncoupling cars in the manner provided by law; that the coupling device upon said tender was designed to couple automatically by impact, but it was defective to such an extent that couplings could not be made automatically, and that defendant's employes were required to go behind said tender in order that couplings might be properly made; that on or about the ninth day of June, 1910, while in the performance of his duties in and about such engine and tender while they were engaged in making an interstate trip and handling interstate commerce in the State of Kansas, it became necessary for plaintiff to go between said tender and a freight car to couple the same together; that said engine and tender were stationary when plaintiff went behind the tender; that while engaged in the opening of said coupling device, and without any signal having been given by him, the defendant negligently caused the engine and tender to be backed, and that by reason of the backing of the engine, and by reason of the fact that defendant's tender had not been provided
509 with secure grab-irons or hand-holds in the end thereof, plaintiff was caught and thrown to the ground and was run upon and over by defendant's tender, causing both of his hands to be amputated and causing other serious and permanent injuries, for which he prayed judgment in the sum of one hundred thousand dollars.

The second count of plaintiff's petition contained allegations similar in all respects to the allegations contained in the first count of his petition, with the exception that the defendant was not charged with negligence in having a defective coupling device upon its tender, nor with failing to have proper grab-irons or hand-holds in the end thereof, but in this count of the petition it was alleged that the defendant maintained upon the rear end of its tender a steam hose, the end of which extended down to within a few inches of the surface of defendant's track, thereby rendering it dangerous for defendant's employes to work around the end of said tender; that while in the performance of his duties in attempting to open the coupling device upon defendant's tender plaintiff was injured by reason of the sudden backing of defendant's engine and tender without a signal from him, and by reason of the manner in which the hose was maintained upon the end of the tender; that plaintiff was thrown to the ground and injured in the same manner described in the first count of his peti-
510 tion. Under this count plaintiff sought to recover damages in the sum of one hundred thousand dollars.

4. On the twenty-ninth day of November, 1911, your petitioner filed in said Circuit Court of Buchanan County, Missouri an answer to plaintiff's amended petition, admitting that it was a corporation engaged in carrying freight and passengers for hire, and that plaintiff sustained injuries while employed by it at the time and place named in his petition. The defendant further alleged that plaintiff was guilty of negligence in stepping behind defendant's moving engine and tender and placing himself in a position of peril, and where the rules of the defendant prohibited his being. The defendant further alleged that by accepting employment from the defendant plaintiff had assumed all the risks and dangers ordinarily incident to his employment, and that the injuries sustained by him resulted from one of the risks and dangers ordinarily incident to such employment.

5. Subsequently the issues raised by the pleadings came on for trial on the fifteenth day of February, 1912, before the Circuit Court of Buchanan County, Missouri, at the regular term thereof. Upon said trial plaintiff introduced evidence tending to show that on or about the date alleged in plaintiff's petition he was employed by the defendant in the operation of a train engaged in handling interstate commerce in the State of Kansas; that the coup-
511 ling device upon the tender attached to defendant's engine was defective, and that it would not couple automatically by impact; that there were no grab-irons or hand-holds upon the end of defendant's tender, and that attached thereto was a hose which hung down within a few inches of the surface of the railroad track; that it became necessary for plaintiff to go behind defendant's tender while the same was stationary for the purpose of opening the coupling device thereon in order that a coupling might be made to a freight car; that while engaged in opening said coupling device defendant's engine and tender were negligently backed upon and over him without his having given any signal for the movement thereof, and that by reason of the backing of the engine and tender, and by reason of the further facts that the coupling device upon the tender was defective, that there were no hand-holds or grab-irons upon the rear end of the tender, and that the hose attached thereto hung down to within a few inches of the ground, plaintiff was caught and thrown to the ground and injured in the manner alleged in his petition.

The evidence introduced on behalf of the defendant tended to show that at the time of the accident complained of the defendant was engaged in handling interstate commerce; that the coupling device upon its tender was in perfect working condition, and that it would couple automatically by impact; that there were
512 upon the rear end of its tender a number of grab-irons or hand-holds, and that in addition to such grab-irons or handholds, properly so called, there was an iron ladder extending up the center of said tender, which was composed of rods of iron and which answered every purpose that grab-irons could have answered; that there was extending across the end of defendant's tender and some inches therefrom an iron rod which was used for the purpose

of operating the coupling device by persons standing at the side of the tender, and for the further purpose of a grab-iron; that said rod answered every purpose of a grab-iron or hand-hold, and that it furnished ample security to employes engaged in the performance of their duties around the end of the tender.

Your petitioner states that under the evidence it asked the trial court to give to the jury its instruction No. 3, which, with the exception of the words "and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars," which words are in italics and were inserted by the trial court over the objections of your petitioner, is in words and figures as follows:

"The Court instructs you that at the time plaintiff was injured the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employes
513 in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employes while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employes, while in the performance of their duties in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance of such work, *and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars*, then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employes, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender."

That said instruction No. 3 was given as modified by the Court over the objections of your petitioner.

At the conclusion of all the evidence, and after the submission of the instructions of the Court and the argument of counsel, the jury returned its verdict in favor of plaintiff under the first count of his petition, and assessed his damages in the sum of twenty-five thousand dollars. Whereupon the Court entered the following judgment:

514 "It is therefore ordered, adjudged and decreed by the Court, in accordance with said verdict, that the plaintiff have

and recover of and from said defendant the sum of twenty-five thousand dollars, so found for him by the jury in this cause, together with his costs herein expended, and have therefor execution."

Thereafter, and on the twenty-fourth day of February, 1911, and during the same term of said Court and within four days after the rendition of said verdict and judgment, the defendant filed in said Court its motion for a new trial; that in said motion for new trial, among other things, the defendant alleged that the Court had committed error in refusing to remove the case to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, and that the Court had committed error in modifying defendant's instruction No. 3 and in giving such instruction as modified; that on the eighth day of May, 1912 said motion for new trial was overruled. Whereupon, the defendant duly appealed the case and took a bill of exceptions to the Supreme Court of the State of Missouri, that being the highest court of law or equity of said state in which a decision could be had in said case, assigning therein as error, among other things, the refusal of the Circuit Court of Buchanan County to transfer the case to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, and in modifying instruction No. 3 asked by the defendant, and giving said instruction as modified over the objections of the defendant.

515 The errors complained of are hereinbefore set out in extenso, and your petitioner shows that each of said grounds raised and presented a federal question in said case, namely:

(*a*) The question as to whether the case was removable to the United States Circuit Court involved the construction of certain acts of the Congress of the United States commonly known as the removal acts.

(*b*) The giving of instruction No. 3 as modified by the Court involved the construction of certain acts of the Congress of the United States commonly known and designated as the Safety Appliances Act and the Employers' Liability Act.

At the October Term, 1915, of the Supreme Court of the State of Missouri, the complaint made by the defendant's bill of exceptions and its accompanying record, came on to be heard and was argued in said Supreme Court, and on the 29th day of February, 1916 the said Supreme Court rendered its final judgment therein, affirming the judgment of the court below, namely the Circuit Court of Buchanan County, Missouri. Thereupon the defendant timely filed in said Supreme Court its motion for rehearing, which motion was by said Supreme Court overruled. Thereupon, and within ten days after the overruling of said motion for rehearing, and on the fifth day of April, 1916, the defendant filed in said Supreme Court of the State of Missouri its motion or petition to transfer said cause to the Supreme Court of Missouri en banc, alleging as grounds

516 therefor that federal questions were involved, and alleging specifically that the questions of removal, and of giving defendant's instruction No. 3 as modified by the trial court, involved the construction of certain Acts of the Congress of the United States,

and that by reason of the provisions of Section 4 of the Amendment of 1890 to Article 6 of the Constitution of the State of Missouri, the case was transferable to Court en banc. The provisions of the Constitution referred to are as follows:

"Sec. 4. Case transfered to Court en banc, when.—When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Your petitioner states that thereafter, and on the second day of June, 1916, the defendant's petition or motion to transfer to Court en banc was overruled.

6. Your petitioner further shows that by virtue of the provisions of the Constitution of the State of Missouri the Supreme Court of said State is composed of two divisions, namely, Divisions No. 1 and No. 2, and that the two divisions of said Supreme Court sitting together constitute the Supreme Court en banc.

7. Your petitioner states that in overruling defendant's motion to transfer the case to Court en banc the Supreme Court of
517 the State of Missouri denied to the defendant the equal protection of the law, and that such denial constituted the taking of defendant's property without due process of law, all in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

8. Your petitioner states that the said judgment of said Supreme Court was and is a final judgment in the highest court of the State of Missouri in which a decision in said cause could or can be had; that federal questions were made in said case as hereinbefore set out; that said judgment of said Supreme Court was repugnant to and in conflict with the laws of the United States and the Acts of its Congress as aforesaid, and that a decision of said federal questions was necessary to the judgment rendered.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of the State of Missouri in said case, files herewith its assignment of errors to which reference is hereby made for other and further errors committed by the said Supreme Court of the State of Missouri, and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed, that the amount of bond be fixed, and that your petitioner be given twenty days in which to file the same, and that upon compliance with the terms of the Statute in such cases made and
518 provided, said bond and writ of error may operate as a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of said Supreme Court of the State of Missouri be reversed.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY,
By GRAHAM G. LACY, *President.*

R. A. BROWN,
Attorney and of Counsel for Petitioner.

STATE OF MISSOURI,
County of Buchanan, ss:

Graham G. Lacy, being duly sworn, deposes and says:
I am President of The St. Joseph & Grand Island Railway Company. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

GRAHAM G. LACY.

Subscribed and sworn to before me this tenth day of June, 1916.

[Seal Richard L. Douglas, Notary Public, Buchanan County, Missouri.]

RICHARD L. DOUGLAS,
Notary Public.

My Commission expires 12, 20, 1919.

518½ Endorsed: #17,221. Ralph W. Moore, Pl'f and Respondent, versus The St. Joseph & Grand Island Ry. Co., Def. and Appellant. Petition for Writ of Error to Supreme Court of the United States. Robt. A. Brown, Att'y. for The St. Jo. & G. I. Ry. Co., Petitioner. Filed Jun- 12 1916. J. D. Allen, Clerk.

519 Which said assignment of errors is in words and figures as follows:

In the Supreme Court of the United States.

RALPH W. MOORE, Defendant in Error,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Plaintiff in Error.

Assignment of Errors.

Comes now the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above entitled cause, there is manifest error in this, towit:

First. The Supreme Court of the State of Missouri erred in holding that the petition of the plaintiff in error, which was filed in the trial court for the removal of this cause to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri was properly denied, and in holding that notwithstanding the filing of said petition for removal and a sufficient bond therewith, the State Court had jurisdiction to try and determine the cause. This cause was instituted and said application for removal made prior to the amendment of Section 28 of the Judicial Code of the United States, which became effective January 1, 1912, and by which, for the first time, limitation was placed upon the character

of controversies removable to the Courts of the United States
520 on account of diversity of citizenship of the parties thereto.

Said Supreme Court therefore erred in affirming the judgment of the trial court, for the reason that neither the trial court nor said Supreme Court had jurisdiction of the cause, which upon the filing of said petition and bond for removal was, by virtue thereof, transferred to said Circuit Court of the United States and all further proceedings therein in the State Courts were and are null and void.

Second. Said Supreme Court erred in holding that instruction numbered one, given to the jury by the trial court for the defendant in error, correctly stated the issues and the law of the case and in holding that the defendant in error could recover under the pleadings on the theory that he was injured when he went behind a moving engine and tender, while they were backing up, for the purpose of adjusting a defective coupler, notwithstanding the fact that in his petition and in his oral testimony he stated that the engine and tender were stationary when he went behind the tender; said instruction complained of is as follows:

"The Court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common carrier, engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine
521 was equipped with a coupler designed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, and you find from the evidence that said tender was not provided with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or handholds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in performance of his duties working in interstate commerce for defendant in coupling and uncoupling said tender to cars and was between the end of said tender and cars, and while in the exercise of ordinary care was, by reason of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, (provided you so find) and because of the failure of the defendant company to provide said tender with

secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, (proviedd you so find) and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender, mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, (provided you so find) run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition."

522 Third. Said Supreme Court erred in holding that said instruction No. 1, given by the trial court for the defendant in error, correctly stated the law with respect to the liability of plaintiff in error, on account of the alleged absence of grab-irons or hand-holds on its tender, and in holding that the words therein contained, which are as follows: "And because of the fact that the pin lifting rod and the ladder and the perpendicular handholds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for the greater security" etc., did not incorrectly advise the jury that such ladder and pin lifting rod were not grab-irons or hand-holds within the meaning of the Federal Safety Appliances Act.

Fourth. Said Supreme Court erred in approving the action of the trial court in modifying defendant's instruction No. 3 and giving said instruction as modified. The instruction as modified told the jury that the attachments or devices upon the end of the tender should have furnished reasonable security to the employes of the defendant in the performance of their duties, when the law imposed no such duty or obligation upon the plaintiff in error. The instruction as modified and given by the trial court is as follows:

523 "The Court instructs you that at the time plaintiff was injured the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employes in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employes while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employes, while in the performance of their duties in coupling and uncoupling cars,

to readily grab hold of the same for their better security while in the performance of such work, *and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars,* then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employes, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender."

The words in italics were inserted by the Court over the objections of plaintiff in error.

Fifth. Said Supreme Court erred in holding in its approval of the above instruction that the Federal Safety Appliances Act "does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission." And in holding that the Act required grab-
524 irons or hand-holds, (technically so called) in addition to other appliances which might be conveniently and securely located, and which might serve every purpose of a hand-hold or grab-iron, although at the same time serving some other purpose.

Sixth. Said Supreme Court erred in holding that defendant in error could recover under his petition and his evidence, which charged the plaintiff in error with negligently backing an engine and tender upon and over him without a signal, even though such allegation in his petition and his evidence were false, and in permitting him to recover upon a theory and upon a state of facts which he solemnly denied under oath. For this reason said Supreme Court erred in holding that instruction marked "A" requested of the trial court by plaintiff in error, was properly refused, and in approving the action of the trial court in refusing said instruction, which is as follows:

"If you believe from the evidence that the defendant's engineer did not back the engine up without a signal from the plaintiff, then your verdict will be for the defendant on both counts of the petition."

Seventh. Said Supreme Court erred in holding that the defendant in error was entitled to recover under the evidence in the case, and in holding that the evidence in the case sustained the issues made by the pleadings.

525 Eighth. Said Supreme Court erred in overruling the motion or petition filed by plaintiff in error praying that the cause be transferred to the Supreme Court of Missouri en banc, and in refusing to so transfer said cause. Said Supreme Court of Missouri is composed of two divisions designated as Divisions Nos. 1 and 2, and under the provisions of the Constitution of the State of Missouri the Supreme Court of Missouri en banc is constituted by both divisions of the Supreme Court sitting together. Federal questions were involved in the case, and the Constitution of the State of Missouri provides that under such circumstances a case shall be trans-

ferred to the Supreme Court en banc, upon the application of the losing party thereto.

Ninth. The Supreme Court in refusing to transfer this case to Court en banc denied to plaintiff in error the equal protection of the law, and sought to take its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

R. A. BROWN,
Attorney for Plaintiff in Error.

525½ [Endorsed:] The St. Joseph & Grand Island Railway Co., Pl't'f in Error, vs. Ralph W. Moore, Def't in Error. Assignment of Errors. Rob't A. Brown, Att'y for Pl't'f in Error. Filed Jun- 12, 1916. J. D. Allen, clerk.

526 In the Supreme Court of the State of Missouri.

No. 17221.

RALPH W. MOORE, Plaintiff and Respondent,
versus
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Defendant and Appellant.

The defendant, The St. Joseph & Grand Island Railway Company, having, as plaintiff in error, this day filed its petition for a writ of error from the judgment and decision made and entered herein to the Supreme Court of the United States, together with assignment of errors within due time, and also praying that an order be made fixing the amount of security which the defendant should give and furnish upon said writ of error, and fixing the time within — such security should be furnished, and praying that upon the giving of such security all further proceedings of this Court, and all process thereof in said cause be suspended and stayed until determination of said writ of error by said Supreme Court of the United States, and said petition having this day been duly allowed,

Now, therefore, it is ordered, that upon the said defendant (plaintiff in error), The St. Joseph & Grand Island Railway Company, filing with the Clerk of this Court within twenty days from this date, a good and sufficient bond in the sum of Fifty Thousand
526½ dollars, conditioned to the effect that if the said defendant, The St. Joseph & Grand Island Railway Company, plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good then the said obligation to be void, otherwise to remain in full force and virtue, the said bond to be approved by the Clerk of this Court, or a Judge thereof, that all further proceedings and process of this Court be, and they are hereby suspended and stayed, until the determination of said writ of error by the said Supreme Court of the United States.

Dated this 12th day of June, 1916.

ROBERT F. WALKER,
Acting Chief Justice of the Supreme Court of the State of Missouri, in the Absence of the Chief Justice.

527 [Endorsed:] No. 17221. Ralph W. Moore, Pl't'ff and Respondent, versus The St. J. & G. I. Ry. Co., Def't and Appellant. Order Allowing Writ of Error to Supreme Court of the United States. Filed Jun- 12 1915. J. D. Allen, Clerk.

528 Which said writ of error is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Missouri, before you, or some of you, being the highest Court of Law or equity of the said State in which a decision could be had in the said suit, between The St. Joseph & Grand Island Railway Company, defendant and plaintiff in error, and Ralph W. Moore, plaintiff and defendant in error, wherein was drawn in question the validity of a statute of, or an authority exercised under the State of Missouri, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of their validity; and wherein was drawn in question the construction of a clause or clauses of the Constitution, or a statute or statutes of, or authority exercised under the United States, and the decision was against the alleged title, right, privilege, or immunity especially set up or claimed under such Constitution, statutes and authority of the United States by the said plaintiff in error, a manifest error has happened to the great prejudice and damage of the said The St. Joseph & Grand Island Railway Company, plaintiff in error, as by its complaint appears.

529 We being willing that error, if any has been committed, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you may have the same at Washington on the 12th day of July next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 12th day of June, 1916.

Done at the office in the City of Jefferson, County of Cole, and

State of Missouri, this 12th day of June, 1916, under my hand and seal of office.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Central Division of the Western District of Missouri,
By H. C. GEISBERG,
Deputy Clerk.

Writ allowed this 12th day of June, 1916, by Honorable Robert F. Walker, Acting-Chief Justice of the Supreme Court of Missouri, in the absence of the Chief Justice.

ROBERT F. WALKER,
Acting Chief Justice of the Supreme Court of Missouri.

530 Supreme Court of the State of Missouri.

STATE OF MISSOURI,
County of Cole, ss:

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, hereby certify that the Honorable Robert F. Walker was on the 12th day of June, 1916, the regularly qualified and acting-Chief Justice of the Supreme Court of Missouri, for and in the absence of the Chief Justice, and that *of* said date the said Chief Justice was absent from the Court, and from the City of Jefferson.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

530½ [Endorsed:] Filed Jun- 12 1916. J. D. Allen, Clerk.

531 Which said citation is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Ralph W. Moore and James W. Mytton or John G. Parkinson, his attorneys and solicitors of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Missouri, wherein The St. Joseph & Grand Island Railway Company is plaintiff in error, and you, the said Ralph W. Moore, are defendant in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error in the Supreme Court of the State of Missouri, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rob't F. Walker, Acting Chief Justice of the Supreme Court of the State of Missouri, this 12th day of June, 1916, in the absence of the Chief Justice.

[Seal of the Supreme Court of Missouri.]

ROBERT F. WALKER,
Acting Chief Justice of the Supreme Court of the State of Missouri.

Attest:
J. D. ALLEN,
Clerk Supreme Court of the State of Missouri.

Service of the within citation and receipt of a copy thereof acknowledged this — day of June, 1916.

——— ———,
——— ———,
Attorneys and Solicitors of Record for Ralph W. Moore, the Within-named Defendant in Error.

STATE OF MISSOURI,
County of Buchanan, ss:

I hereby certify that I served the within citation on the within named James W. Mytton, senior member of the law firm of Mytton & Parkinson, and one of the attorneys and solicitors for Ralph W. Moore, defendant in error named within, on the 15th day of June, 1916, in the City of St. Joseph, Buchanan County, Missouri, by then and there delivering a true copy of said citation to said James W. Mytton, personally.

C. H. JONES,
Sheriff of Buchanan County, Missouri,
By L. L. ROESLE,
Deputy.

532 [Endorsed:] 17,221. The St. Joseph & Grand Island Ry. Co., Pl'ff in Error, vs. Ralph W. Moore, Def. in Error. Citation. Filed June 12, 1916. J. D. Allen, Clerk. M.

533 Which said præcipe for transcript is in words and figures as follows:

In the Supreme Court of the United States.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Plaintiff in Error,
versus
RALPH W. MOORE, Defendant in Error.

To Honorable J. D. Allen, Clerk of Supreme Court of the State of Missouri:

Please prepare and transmit a transcript of the record in the above entitled cause, which is an action to review the actions, judgments and decisions of the Supreme Court of Missouri, in an action entitled Ralph W. Moore, respondent, versus The St. Joseph & Grand Island Railway Company, appellant, and include in such transcript of the record the following pleadings, evidence, records and proceedings had and entered of record in the Supreme Court of the State of Missouri, towit:

Record entry in the Supreme Court of the State of Missouri showing filing of a transcript on appeal in above cause.

Record entry in the Supreme Court showing filing of appellant's abstract of the record in said cause.

The following described portions of appellant's abstract of the record in said cause, (all numbers mentioned are inclusive):

534 Pages 1 to 22; page 25 line 21 to page 32 line 22; page 35 line 26 to page 37 line 11; page 39 line 14 to page 41 line 16; page 41 line 32 to page 44 line 9; page 44 line 20 to page 47 line 24; page 50 line 1 to page 58 line 25; page 59 line 6 to end of page 77; page 82 line 1 to page 85 line 2; page 85 line 14 to page 105 line 26; page 111 line 20 to page 120 line 2; page 121 line 6 to end of page; page 129 line 19 to page 153 line 19; page 156 line 13; only; page 157 line 23 to page 162 line 21; page 163 line 21 to end of page 165; page 166 line 27 to page 174 line 18; page 175 line 25 to page 197 line 7; page 198 line 11 to line 16; page 199 line 6 to page 218 line 10; page 219 line 3 to page 239 line 7; page 239 line 24 to end of page 241; page 242 line 13 to line 15; page 242 line 22 to end of page 260; page 261 line 16 to page 267 line 13; page 269 line 25 to page 270 line 1; page 270 line 12 to end of page 277; page 279 line 17 to line 20; page 280 line 18 to end of page; page 281 line 17 to page 286 line 20; page 287 line 7 only; page 288 line 20 to end of page 297, including photograph on said page; page 299 line 1 to line 10; page 300 line 22 to page 302 line 25; page 305 line 1; page 305 line 20 to page 306 line 13; page 307 line 22 to line 27; page 308 line 5 to page 310 line 14; page 311 line 6 to line 10; page 314 line 1 to line 3; page 321 line 15 to page 323 line 6; page 324 line 3 to line 9; page 324 line 28 to line 31; page 325 line 11 to page 327 line 30; page 333 line 14 to end of page; page 335 line 19 to line 25; page 336 line 19 to page 337 line 4; page 337 line 21; page 338 line 26 to page 340 line 2; page 340 line 15 to page 341 line 10; page 343 line 9 to line 28; page 344 line 14 to page 345 line 3; page 346

line 23 to page 355 line 16; page 356 line 12 to line 29; page 357 line 30 to page 361 line 25; page 363 line 19, to end of page; page 365 line 18; page 367 line 23 to page 369 line 12; page 373 line 1 to page 380 line 15; page 381 line 5 to page 383 line 4; page 384 line 11 only; page 386 line 30 to page 394 line 22; page 397 line 31 to page 399 line 15; page 400 line 4 to line 14; page 401 line 8 to page 402 line 5; page 403 line 2 only; page 404 line 6 to page 406 line 10; page 408 line 8 to page 411 line 9; page 412 line 12 to page 415 line 1; page 415 line 25 to page 416 line 25; page 432 line 16 to end of page 437; page 438 line 6 to line 10; page 438 line 17 to page 439 line 8; page 439 line 23 to end of page; page 443 line 29 to end of page 445; page 450 line 23 to page 451 line 26; page 452 line 18 to page 455 line 16; page 456 line 18 to page 457 line 5; page 457 line 22 to page 459 line 12; page 459 line 20 to page 460 line 25; page 461 line 11 to page 462 line 18; page 465 line 21 to end of page 476; page 486 line 1 to page
535 491 line 2; page 492 line 21 to end of page 500; page 502 line 8; page 502 line 30 to end of page 504; page 505 line 17 to page 510 line 20; page 512 line 10 to page 518 line 1; page 518 line 29 to end of page 521; page 522 line 34 to end of page 528; page 531 line 10 to page 533 line 6; page 533 line 27 to page 536 line 12; page 537 line 15 to page 541 line 11; page 542 line 24 to page 545 line 10; page 547 line 27 to page 548 line 3; page 549 line 9 to end of page 550, including photograph on page 550; page 559 line 18 to page 563 line 20; page 564 line 1 to page 567 line 21; page 572 line 6 to page 590 line 22; page 594 line 5 to end of page 602.

Opinion of Division Number One of the Supreme Court of Missouri, filed February 29, 1916, affirming the judgment of the Circuit Court.

Order dated February 29, 1916, affirming judgment of Circuit Court.

Motion for rehearing filed March 8, 1916.

Motion to transfer to court en banc filed March 9, 1916.

Order overruling motion for rehearing dated March 30, 1916.

Order overruling motion to transfer to court en banc dated March 30, 1916.

Motion to transfer to court en banc filed on or about April 4, 1916, and order dated June 2, 1916, overruling same.

Petition for writ of error to the Supreme Court of the United States filed June 12, 1916.

Assignment of errors filed June 12, 1916, with said petition.

Order allowing writ of error and fixing terms of supersedeas dated June 12, 1916.

Writ of error dated June 12, 1916.

Citation dated June 12, 1916.

Præcipe for transcript on writ of error.

Supersedeas bond.

R. A. BROWN,

Attorney for The St. Joseph & Grand Island Railway Company, Plaintiff in Error.

536 STATE OF MISSOURI,
County of Buchanan, ss:

I, the undersigned Sheriff of Buchanan County, Missouri, hereby certify that I served the within præcipe in said county and state on this 24th day of June, 1916, by delivering a true and correct copy thereof to James W. Myton, attorney for Ralph W. Moore, defendant in error therein named, personally, and by further delivering a true and correct copy thereof to John G. Parkinson, attorney for said Ralph W. Moore, personally.

C. H. JONES,
Sheriff of Buchanan County, Missouri,
By JOHN CURTIN,
Deputy.

537 [Endorsed:] 17221. The St. Joseph & Grand Island Ry. Co., Pl't'f in Error, vs. Ralph W. Moore, Def. in Error. Præcipe for Transcript. Filed Jun- 26, 1916. J. D. Allen, Clerk.

538 A copy of which supersedeas bond is in words and figures as follows:

In the Supreme Court of the State of Missouri.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Plaintiff in Error,
versus
RALPH W. MOORE, Defendant in Error.

Know all men by these presents: That we, The St. Joseph & Grand Island Railway Company, a corporation, as principal, and National Surety Company, as surety, are held and firmly bound unto the above named, Ralph W. Moore, in the sum of fifty thousand dollars ($50,000.00), for the payment of which well and truly to be made, to the said Ralph W. Moore, his heirs, representatives or assigns, we bind ourselves, our successors and assigns jointly and severally by these presents.

The condition of this obligation is such, that,

Whereas, the above named principal has sued out a writ of error from the Supreme Court of the United States, directed to the Supreme Court of the State of Missouri, in a certain cause pending in said Supreme Court of the State of Missouri wherein a judgment was rendered in favor of said Ralph W. Moore and against the said The St. Joseph & Grand Island Railway Company, for the sum of twenty-five thousand dollars ($25,000.00), interest and costs, and,

539 Whereas, upon the application of said The St. Joseph & Grand Island Railway Company, a supersedeas was granted

upon the issuance of said writ of error, conditioned that it file a good and sufficient bond in the sum of fifty thousand dollars ($50,000.00) in the form provided by law:

Now therefore, if the above named, The St. Joseph & Grand Island Railway Company, plaintiff in error, shall prosecute the said proceedings in error to effect in the Supreme Court of the United States, and answer all damages and costs, if it fail to make its plea good, and judgment be rendered against it therein, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

In witness whereof said The St. Joseph & Grand Island Railway Company, as principal, and the said National Surety Company, as surety, have caused these presents to be executed by their respective officers thereunto duly authorized, and have caused their respective corporate seals to be hereto affixed, this 24th day of June, 1916.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY,
By GRAHAM G. LACY, *Its President.*

[Seal of The St. Joseph & Grand Island Railway Company.]

Attest:

W. N. PURVIS, *Secretary.*

NATIONAL SURETY COMPANY,
By MILLARD F. FINKHOUSER,
Resident Vice-President.

[Seal of National Surety Company.]

Attest:

HARY L. MALLO,
Resident Assistant Secretary.

The original of this bond has this day 6/30/16 been approved by me as to form and amount.

R. F. WALKER,
Judge Sup. Ct. Mo.

Attest:
J. D. ALLEN, *Clerk.*

540 In the Supreme Court of Missouri.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and correct copy of all matters and proceedings and all copies of papers filed in this office in the case of Ralph W. Moore v. The St. Joseph & Grand Island Ry. Co., as called for in the præcipe for a transcript of record filed by the Plaintiff in Error in said cause, as fully as the same appear of record or on file in my office.

In testimony whereof, I have hereunto set my hand and affix the seal of our said Supreme Court, at my office in the City of Jefferson, State of Missouri, this 7th day of July, 1916.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

541 To the Supreme Court of the United States:

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Plaintiff in Error,
versus
RALPH W. MOORE, Defendant in Error.

Prayer for Reversal.

Now comes The St. Joseph & Grand Island Railway Company, plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of the State of Missouri, in the action brought by Ralph W. Moore, as plaintiff (and respondent in the Supreme Court of Missouri) against The St. Joseph & Grand Island Railway Company as defendant (and appellant in the Supreme Court of Missouri), which judgment was rendered by said Court and entered in the office of the clerk thereof on the 29th day of February, 1916; and it also prays for a reversal of the order of affirmance of the judgment of the Circuit Court of Buchanan County, Missouri, entered in said cause in the Supreme Court of the State of Missouri, on the 29th day of February, 1916; and it also prays for a reversal of the judgment of the Circuit Court of Buchanan County, Missouri, rendered in said cause and entered on the 2nd day of
542 February, 1912, in the office of the clerk of said Court.

ROBT. A. BROWN,
Attorney for The St. Joseph & Grand Island Railway Company, Plaintiff in Err.

543 [Endorsed:] The St. Joseph & Grand Island Railway Company, Plaintiff in Error, versus Ralph W. Moore, Defendant in Error. Prayer for reversal. Robert A. Brown, Attorney for plaintiff in error.

544 In the Supreme Court of Missouri, Division No. 1, April Term, 1916.

No. 17221.

RALPH W. MOORE, Respondent,
vs.
THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

On the application of the plaintiff in error I have this day enlarged for a period of ten days from this date the time for filing the record

in the above entitled cause with the clerk of the Supreme Court of the United States.

This 12th day of July, 1916.

R. F. WALKER,
Judge of the Supreme Court of Missouri.

[Seal of the Supreme Court of Missouri.]

Attest:

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

Endorsed on cover: File No. 25,403. Missouri Supreme Court. Term No. 573. The St. Joseph & Grand Island Railway Company, plaintiff in error, vs. Ralph W. Moore. Filed July 14, 1916. File No. 25,403.

Office Supreme Court, U. S.
FILED
JAN 20 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

Summary Docket No. 573

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY
Plaintiff in Error,

versus

RALPH W. MOORE,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT A. BROWN,
Solicitor for Plaintiff in Error

(25403)

INDEX

Page

Abstract or Statement of Case..... 1
Specification of Errors..... 9
The cause should have been removed to the Circuit Court of the United States.....15
The cause should not have been submitted to the jury, and the Supreme Court of Missouri erred in approving instruction numbered one, given in behalf of defendant in error 17
Instruction marked A, requested by plaintiff in error, should have been given.....49
As to error in giving and approving instruction numbered three, requested by plaintiff in error, as modified by the court 50
The case should have been transferred to court, en banc...55

LIST OF CASES CITED

American Railroad Co. of Porto Rico vs. Didrickson, 227 U. S. 145 48
A. T. & S. F. Ry. Co. vs. Matthews, 174 U. S. 96.....57
Beaver Hill Coal Co. vs. Lasilla, 176 Fed. 725.....49
Berry vs. Chase, 146 Fed. 625.....42
Central Vermont Ry. Co. vs. White, 238 U. S. 507.....46-47
Cresswill vs. Grand Lodge, K. of P., 225 U. S. 246.....47
C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226.....58
Delk vs. St. L. & S. F. Ry. Co., 220 U. S. 580.....47
Dome City Bank vs. Barnett, 181 Fed. 607.....48
Ex parte Virginia, 100 U. S. 339.....58
Frost vs. Wenie, 157 U. S. 46.....16
Frizzell vs. Omaha St. Ry. Co., 124 Fed. 176.....49
Grady vs. St. Louis Transit Co., 169 Fed. 400.....49
Hart vs. Northern Pac. Ry., 196 Fed. 180.....42
Haskell vs. Columbus Savings & Trust Co., 207 Fed. 322...42
Kansas City So. R. Co. vs. Com. Co., 223 U. S. 573.....47
K. C. S. Ry. Co. vs. Leslie, 238 U. S. 599.....15
Kane vs. Northern Central R. Co., 128 U. S. 91.....42
Mt. Adams Et. Co. vs. Lowery, 74 Fed. 463.....42
Morris vs. Beach, 191 Fed. 34.....49
Moore vs. State of Missouri, 159 U. S. 673.....57
Noble vs. C. Crane & Co., 169 Fed. 55.....42
N. Y. C. & H. R. Co. vs. Difendaffer, 125 Fed. 893.....42
North Carolina Rld. Co. vs. Zachary, 232 U. S. 248.....47
Nevada Co. vs. Farnsworth, 102 Fed. 573.....49
Ozenne vs. Ill. Cent. R. Co., 151 Fed. 900.....42
Pheasants vs. Fant, 22 Wall. 116.....42
Postal Tel. Cable Co. vs. Grantham, 187 Fed. 52.....42
Southern Railway Co. vs. Lloyd, 239 U. S. 496.....15
Southern Pac. Co. vs. Pool, 160 U. S. 438.....42
Schuylhill Etc. Imp. Co. vs. Munson, 14 Wall. 442.....42

Page
Seaboard Air Line Ry. Co. vs. Padgett, 236 U. S. 668.....46
St. Louis I. M. & S. Co. vs. McWhirter, 229 U. S. 276.....47
Spokane & I. E. Ry. Co. vs. U. S., 210 Fed. 243.....53
Scott vs. McNeel, 154 U. S. 34.....58
Toledo, St. L. & W. R. Co. vs. Howe, 191 Fed. 776.....42
Texas & Pac. Ry. Co. vs. Cox, 145 U. S. 593.....42
Toledo, St. L. & W. R. R. Co. vs. Slavin, 236 U. S. 454.....58
U. S. vs. Levois, 17 Howard, 85 16
U. S. vs. Greathouse, 166 U. S. 601.....16
U. S. vs. Healy, 160 U. S. 131.....16
U. S. vs. Barnes, 222 U. S. 513.....17
U. S. vs. Boston & M. R. Co., 168 Fed. 148.....53
Virginia & S. W. Ry. Co. vs. Hawk, 160 Fed. 348.....42
Washington ex rel. O. R. & N. Co. vs. Fairchild, et al., 224 U. S. 510 47
Yick Wo vs. Hopkins, 118 U. S. 356.....57
Zilbesher vs. Pa. R. Co., 208 Fed. 280.....42

Supreme Court of the United States

OCTOBER TERM, 1916

Summary Docket No. 573

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY
Plaintiff in Error,

versus

RALPH W. MOORE,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT

This cause comes to this Court on writ of error to the Supreme Court of the State of Missouri to review the judgment and decision of that Court affirming the judgment of the Circuit Court of Buchanan County, Missouri, in favor of defendant in error for the sum of twenty-five thousand dollars, for injuries sustained by him while employed by the plaintiff in error as freight brakeman and engaged in interstate commerce. (Rec. 284.)

The first count of the petition on which the cause was tried, and upon which the verdict and judgment were rendered, alleged the interstate character of the work being done by defendant in error, and alleged that while engaged in the performance of certain switching operations, incident to the handling of interstate commerce, it became necessary for defendant in error to go behind an engine and tender for the purpose of

adjusting a coupler which had failed to operate automatically by impact; that while he was in such position the engine and tender were negligently backed without a signal from defendant in error, and that on account of such negligent backing of the engine, and on account of the defective coupling apparatus, and on account of an alleged lack of grab-irons or hand-holds on the rear end of said tender, defendant in error was run against and over, and that by reason thereof both his hands were amputated and he was otherwise injured. (Rec. 7.)

The accident occurred on the ninth day of June, 1910, and suit was filed February 3, 1911. Plaintiff in error in due time filed its petition and a sufficient bond for the removal of the cause to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, which includes Buchanan County, Missouri, where the suit was originally filed, alleging among the other grounds for removal, the fact that the defendant in error was a resident of St. Joseph, Missouri, within said federal division and district, and that the plaintiff in error was a corporation and a citizen and resident of the State of Kansas and not of the State of Missouri. This application for removal was in due time overruled. (Rec. 3-7.)

At the trial it was admitted that defendant in error was, at the time of the accident, employed by the railway company in handling interstate commerce, and the application of the Federal Employers' Liability Act was conceded. (Rec. 17.)

The defendant in error testified that the coupler on the rear end of the tender, being operated by plaintiff in error at the time of the accident complained of in his petition, was defective to such an extent that it would not work automatically by impact (Rec. 19-20), and that he went behind the tender while it was stationary, and that

while attempting to open the coupler the tender was backed upon him without a signal and without warning. (Rec. 23-4.) This testimony was not supported by any other statement, fact or circumstance in evidence, and by reason of the statements and admissions made by defendant in error and shown by the evidence, in the very nature of things was so improbable as to be void of probative force or effect. The witness further testified that the rear end of the tender was not equipped with grab-irons in the manner provided by law. (Rec. 19.) The evidence introduced by plaintiff in error was to the effect that the coupling device on the rear end of plaintiff in error's tender was in perfect condition, and that it operated automatically by impact. (Rec. 67, 79, 101, 102, 112, 113, 138, 139, 140, 144, 149, 150, 153, 154, 156, 162, 163, 172, 181, 182, 194.)

The evidence of plaintiff in error further showed that an iron rod extended across the rear end of the tender; that it was attached thereto by brackets, and that there was a clearance between the rod and the end of the tender of two and one-half inches; that this rod was designated as a "pin-lifting rod," and was so located that it could be conveniently grasped by anyone having occasion to work around the end of the tender, and that on and prior to June 9, 1910, and on the date when defendant in error was injured, it was customary among railroads and their employes, to regard such devices as grab-irons or hand-holds as well as pin-lifting rods. It was also shown that there were other grab-irons or hand-holds upon the rear end of the tender. (Rec. 68, 69, 141, 149, 154, 169, 172, 182, 186, 195.)

It was shown in evidence that the Master Car Builders' Association, which includes among its members representatives of all the railroad companies in the United States, and which promulgates rules for the guidance of its members, at

the time of the accident complained of had in effect a rule which provides as follows:

> "(4) Each end of car to be provided with two horizontal hand-holds, not less than twelve inches, and preferably sixteen inches in the clear, or longer, located not over thirty inches above center line of coupler, or placed under the end sill as near the face as will insure a good, safe fastening, or, if preferred, may be placed on the face of end sill. The coupler unlocking rod, the tread of the ladder or any suitably located part of the car which does not exceed two inches on each side or in diameter, and has the proper clearance, will be considered a suitable end hand-hold."

An issue of fact was presented in the trial Court as to whether or not the pin-lifter rod on the back end of the tender described in evidence was a grab-iron or hand-hold within the meaning of the Act of Congress commonly known as the Safety Appliances Act.

In behalf of the defendant in error the jury were instructed that in the event they should find among other things that the coupling device was defective, and that because of that fact and "because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find)," defendant in error was run over and injured, they should find for the defendant in error. The question of the alleged negligence of the plaintiff in error in causing the engine and tender to be backed without

a signal and without warning was not submitted to the jury. (Rec. 239.) To the giving of this instruction plaintif in eror duly excepted. (Rec. 239-242.)

Plaintiff in error requested, and the trial Court refused to give, an instruction to the effect that any iron rod or iron device securely fastened upon the end of the tender and to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars, was a grab-iron or hand-hold within the meaning of the law, and that if the pin-lifting rod extended across the rear end of the tender, and was so fastened and constructed that it could be conveniently grasped by employes for their greater security while coupling and uncoupling cars, then such pin-lifting rod was a grab-iron within the meaning of the law. (Rec. 243-4.) After refusing to give the instruction as requested by the plaintiff in error, the Court of its own motion modified it by adding thereto the following words: "That said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars." To the giving of this modified instruction the railway company timely saved its exceptions. The issue was therefore sharply presented, as stated by the Supreme Court of Missouri in its opinion in the case, as to whether or not the Safety Appliances Act permitted the use, as grab-irons, of devices conveniently and securely located, which, however, served other purposes on the cars; also the issue as to whether or not if such dual use is permitted by the Act the appliance serving such dual purpose is required to afford *reasonable security under all circumstances to the employe using it.* The Supreme Court of Missouri not only held that it was not improper to tell the jury, as a matter of law, that such an appliance *must furnish reasonable secur-*

ity to the employes under all circumstances, but held further that the Safety Appliances Act did not permit the use of the pin-lifter rod as a grab-iron. (Rec. 260-262.)

Plaintiff in error requested and the trial court refused to give its instruction marked "A", which told the jury that if the engineer did not back the engine without a signal from plaintiff, then he could not recover under his petition. The action of the trial court in refusing to give this instruction was approved by the Supreme Court of Missouri.

The constitution of the State of Missouri provides for two divisions of the Supreme Court of the state, and further provides that under certain circumstances the judges of both divisions shall sit as Court *en banc.* Section 4, of the Amendment of 1890 to Article VI of said Constitution, provides as follows:

> "Sec. 4. *Case transferred to Court, en banc, when.* When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party shall be transferred to the Court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the Court for its decision."

The appeal taken by plaintiff in error to the Supreme Court of Missouri was heard in Division No. 1 thereof, and all of the contentions of plaintiff in error were there ruled against it, including its contention that the cause should have been removed to the United States Circuit Court on its application duly filed in the trial court; the contention that its instruction marked "A" should have been given and the contention that error was committed against it by the Supreme Court in holding that the case should have been submitted to

the jury under the first count of the petition, and in construing the provisions of the Safety Appliance Act, as mentioned above. (Rec. 255.)

After an unsuccessful effort to secure a rehearing in Division No. 1 of said Supreme Court, plaintiff in error filed therein its motion to transfer the cause to the Court *en banc*, pursuant to the provisions of the Constitution above quoted. The federal questions involved were specifically pointed out in the motion, and the constitutional right of plaintiff in error to have the cause transferred was urged. (Rec. 270-272.) On June 2, 1916, the Court overruled the application to transfer the cause to the Supreme Court, *en banc*, and this writ of error was thereupon duly sued out. (Rec. 270-272.)

The questions to be submitted for the consideration of this Court, and the order in which they will be presented are:

I.

The application of plaintiff in error for the removal of the cause to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri.

II.

The approval by the Supreme Court of Missouri of instruction numbered one, which was given by the trial court in behalf of defendant in error, and which submitted to the jury under the first count thereof:

(a) The question as to whether the coupler on the rear end of the tender described in evidence was defective, when it was contended by plaintiff in error that there was no credible evidence tending to establish that fact, and which authorized a finding in favor of defendant in error under said first count of his petition; and,

(b) Which authorized a finding in favor of defendant in error, even though he went behind the tender *while it was in motion*, when he had alleged in his petition and had testified that the engine and tender *were stationary;* and,

(c) Which authorized a finding in favor of defendant in error, if the jury should believe that the alleged defective condition of the coupler, and the alleged lack of grab-irons, caused the tender and engine to run against and over him, when there was no evidence proving or tending to prove that the alleged defective condition of the coupler or the alleged lack of grab-irons caused the tender to back against and over defendant in error. *It was the backing of the engine*, as alleged in the petition, which caused the accident.

III.

The action of the Supreme Court of Missouri in approving the action of the trial court in refusing to give instruction marked A, requested by plaintiff in error.

IV.

The action of the Supreme Court of Missouri in approving instruction numbered three as modified by the trial court, and submitted to the jury in behalf of plaintiff in error over its objections, and in holding that the Safety Appliances Act did not permit the use of the pin-lifting rod as a grab-iron.

V.

The action of Division No. 1 of the Supreme Court of Missouri in refusing to transfer the case to the Court *en banc*, upon application of plaintiff in error.

ASSIGNMENT OF ERRORS

Comes now the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above entitled cause, there is manifest error in this, towit:

FIRST—The Supreme Court of the State of Missouri erred in holding that the petition of the plaintiff in error, which was filed in the trial court for the removal of this cause to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, was properly denied, and in holding that notwithstanding the filing of said petition for removal and a sufficient bond therewith, the State Court had jurisdiction to try and determine the cause. This cause was instituted and said application for removal made prior to the amendment of Section 28 of the Judicial Code of the United States, which became effective January 1, 1912, and by which for the first time, limitation was placed upon the *character* of controversies removable to the Courts of the United States on account of diversity of citizenship of the parties thereto. Said Supreme Court therefore erred in affirming the judgment of the trial court, for the reason that neither the trial court nor said Supreme Court had jurisdiction of the cause, which upon the filing of said petition and bond for removal, was, by virtue thereof, transferred to said Circuit Court of the United States and all further proceedings therein in the State Courts were and are null and void.

SECOND—Said Supreme Court erred in holding that instruction numbered one, given to the jury by the trial court for the defendant in error, correctly stated the issues and the law of the case, and in holding that the defendant in error could recover under the pleadings on the theory that he was injured when he went behind a moving engine

and tender, while they were backing up, for the purpose of adjusting a defective coupler, notwithstanding the fact that in his petition and in his oral testimony he stated that the engine and tender were stationary when he went behind the tender; said instruction complained of is as follows:

> "The Court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common carrier, engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler designed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, and you find from the evidence that said tender was not provided with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in performance of his duties working in interstate commerce for defendant in coupling and uncoupling said tender to cars and was between the end of said tender and cars, and while in the exercise of ordinary care was, by rea-

son of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars (provided you so find), and because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender, mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition."

THIRD—Said Supreme Court erred in holding that said instruction No. 1, given by the trial court for the defendant in error, correctly stated the law with respect to the liability of plaintiff in error, on account of the alleged absence of grab-irons or hand-holds on its tender, and in holding that the words therein contained, which are as follows:

"And because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for the greater security," etc., did not incorrectly advise the jury that such ladder and pin-lifting rod were not grab-irons or hand-holds within the meaning of the Federal Safety Appliances Act.

FOURTH—Said Supreme Court erred in approving the action of the trial court in modify-

ing defendant's instruction No. 3 and giving said instruction as modified. The instruction as modified told the jury that the attachments or devices upon the end of the tender should have furnished reasonable security to the employes of the defendant in the performance of their duties, when the law imposed no such duty or obligation upon the plaintif in error. The instruction as modified and given by the trial court is as follows:

> "The Court instructs you that at the time plaintiff was injured the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employes in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employes while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employes, while in the performance of their duties in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance of such work, *and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars,* then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use

> of plaintiff or other employes, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender."

The words in italics were inserted by the Court over the objections of plaintiff in error.

FIFTH—Said Supreme Court erred in holding in its approval of the above instruction that the Federal Safety Appliances Act "does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission." And in holding that the Act required grab-irons or hand-holds (technically so called), in addition to other appliances which might be conveniently and securely located, and which might serve every purpose of a hand-hold or grab-iron, although at the same time serving some other purpose.

SIXTH—Said Supreme Court erred in holding that defendant in error could recover under his petition and his evidence, which charged the plaintiff in error with negligently backing an engine and tender upon and over him without a signal, even though such allegation in his petition and his evidence were false, and in permitting him to recover upon a theory and upon a state of facts which he solemnly denied under oath. For this reason said Supreme Court erred in holding that instruction marked "A" requested of the trial court by plaintiff in error, was properly refused, and in approving the action of the trial court in refusing said instruction, which is as follows:

> "If you believe from the evidence that the defendant's engineer did not back the engine up without a signal from the plaintiff, then your verdict will be for the defendant on both counts of the petition."

SEVENTH—Said Supreme Court erred in holding that the defendant in error was entitled to recover under the evidence in the case, and in holding that the evidence in the case sustained the issues made by the pleadings.

EIGHTH—Said Supreme Court erred in overruling the motion or petition filed by plaintiff in error praying that the cause be transferred to the Supreme Court of Missouri, *en banc*, and in refusing to so transfer said cause. Said Supreme Court of Missouri is composed of two divisions designated as Divisions Nos. 1 and 2, and under the provisions of the Constitution of the State of Missouri the Supreme Court of Missouri, *en banc*, is constituted by both divisions of the Supreme Court sitting together. Federal questions were involved in the case, and the Constitution of the State of Missouri provides that under such circumstances a case shall be transferred to the Supreme Court, *en banc*, upon the application of the losing party thereto.

NINTH—The Supreme Court in refusing to transfer this case to Court, *en banc*, denied to plaintiff in error the equal protection of the law, and sought to take its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR

I.

UPON THE RECORD BEFORE THIS COURT, PLAINTIFF IN ERROR'S APPLICATION TO REMOVE THE CAUSE TO THE CIRCUIT COURT OF THE UNITED STATES SHOULD HAVE BEEN GRANTED. THE STATE COURT WAS WITHOUT JURISDICTION TO TRY THE CASE, AND ITS JUDGMENT THEREIN IS VOID.

It is true that this Court in the case of K. C. S. Ry. Co. vs. Leslie, 238 U. S. 599, 59 L. Ed. 1478, and again in the case of Southern Railway Company vs. Lloyd, 239 U. S. 496, has said that under *both* the amendment of April 5, 1910, to the Employers' Liability Act, and the proviso contained in Section 28 of the Judicial Code, which became effective January 1, 1912, a cause brought under the Employers' Liability Act in a state court is not removable on any ground or for any reason. *But in neither of those cases was it necessary for this Court to decide or declare the effect of the amendment of* 1910 *standing alone*, for both of those cases were instituted *after* January 1, 1912, and after Section 28 of the Judicial Code became effective. At least we feel justified in assuming that the Lloyd case was instituted subsequent to January 1, 1912, since while the date of filing does not appear in either the reported opinion of this Court or in the reported proceedings in the state Court, *it does appear that the cause was not tried until February*, 1913.

This Court has so consistently followed the rule of deciding only so much as is necessary to dispose of the case before it that we feel justified in concluding that anything in the *Leslie* and *Lloyd* cases which appears to apply to this case, which was instituted in February, 1911, nearly a year be-

fore Section 28 of the Judicial Code became effective, is *dictum* pure and simple.

Plaintiff in error contended in the state court and contends here that the Amendment of April 5, 1910, to the Employers' Liability Act did not prohibit removal on any ground mentioned in the Removal Act (now Section 28 of the Judicial Code), except the sole ground that the cause arose under the Federal Act. In other words, the amendment was nothing more than what it purpoted to be, an amendment to the Employers' Liability Act, and not an amendment to the Judiciary Act. It did not purport to *repeal* any existing law, nor to *amend* any existing law other than the Liability Act itself, nor does its title reveal any such purpose or intention.

In order to deny the right of removal in this case it is necessary to hold that the Amendment of April 5, 1910, *repealed* the Removal Section of the Judiciary Act *in toto* with respect to Employers' Liability cases, and such a rule of construction has never been approved by this Court. On the contrary this Court has always held that repeals by implication are looked upon with disfavor, and that, where it is possible to do so, full effect will be given to all provisions of laws contemporaneously in effect.

United States vs. Levois, 17 How. 85, 15 L. Ed. 54.

United States vs. Greathouse, 166 U. S. 601, 41 L. Ed. 1130.

United States vs. Healey, 160 U. S. 136, 40 L. Ed. 369.

Frost vs. Wenie, 157 U. S. 46, 39 L. Ed. 614.

This Court has also held that in construing subsequent legislation affecting a subject already covered by a general code, the presumption will prevail that the general rules of the code are not suspended save as the contrary clearly appears.

United States vs. Barnes, 222 U. S. 513, 56 L. Ed. 291.

It is significant that when the Judicial Code was enacted effective January 1, 1912, congress deemed it necessary to place the proviso in Section 28 of that code, a wholly unnecessary action if the Amendment of April 5, 1910, to the Liability Act be given the sweeping effect contended for by defendant in error. It is also significant that when congress decided to take away the right of removal of causes arising under the Carmack Amendment to the Act to Regulate Commerce, *it was Section 28 of the Judicial Code that was amended* and not the Act to Regulate Commerce.

The only ground for removal *necessarily* taken away by the Amendment of April 5, 1910, is that arising from the fact that a Liability case is founded upon a Federal Statute. We respectfully state that this Court has never had a case before it in which it *could* decide the identical question now presented, and furthermore, that if it was the intention of this Court that the *Leslie* and the *Lloyd* cases should decide it, we are justified in urging a reconsideration in a *case where the question is an issue*, and where the decision will be something more than *dictum*.

II.

INSTRUCTION NUMBERED ONE, GIVEN BY THE TRIAL COURT IN BEHALF OF DEFENDANT IN ERROR, AND APPROVED BY THE SUPREME COURT OF MISSOURI, SUBMITTED TO THE JURY:

(a) THE QUESTION OF THE ALLEGED DEFECTIVE COUPLER, WHEN IT WAS CONTENDED BY PLAINTIFF IN ERROR THAT THERE WAS NO EVIDENCE OF PROBATIVE FORCE OR EFFECT TENDING TO SHOW THAT THE COUPLER WAS DEFECTIVE.

(b) THE INSTRUCTION AUTHORIZED A FINDING IN FAVOR OF DEFENDANT IN ERROR, EVEN THOUGH HE WENT BEHIND THE TENDER WHILE IT WAS IN MOTION, WHEN HE HAD ALLEGED IN HIS PETITION AND HAD TESTIFIED THAT THE ENGINE WAS STATIONARY. THIS WAS CLEARLY A DEPARTURE.

(c) THE INSTRUCTION AUTHORIZED A FINDING IN FAVOR OF THE DEFENDANT IN ERROR, IF THE JURY SHOULD BELIEVE THAT BY REASON OF THE ALLEGED DEFECTIVE COUPLER, AND BY REASON OF THE ALLEGED LACK OF GRAB-IRONS UPON THE REAR END OF THE TENDER, SAID TENDER WAS CAUSED TO RUN AGAINST AND OVER DEFENDANT IN ERROR, WHEN THERE WAS NO EVIDENCE TENDING TO PROVE THAT THE ALLEGED DEFECTIVE CONDITION OF THE COUPLER, OR THE ALLEGED LACK OF GRAB-IRONS CAUSED, OR COULD HAVE CAUSED, THE TENDER TO BACK AGAINST AND OVER DEFENDANT IN ERROR. *It was the backing of the engine* WHICH CAUSED THE ACCIDENT, AS ALLEGED IN THE PETITION.

THE GIVING OF THIS INSTRUCTION AND ITS APPROVAL BY THE SUPREME COURT OF MISSOURI IS COMPLAINED OF IN PLAINTIFF IN ERROR'S SECOND AND SEVENTH ASSIGNMENTS OE ERRORS.

(a) Defendant in error testified that he had been out on the road with the engine and tender described in evidence three or four days; that he had noticed that the coupler on the tender could not be opened with the appliance provided for that purpose, and that it was necessary to open the same with the hands; that he had notified the conductor of such defective condition and that the conductor had promised that it would have attention. Notwithstanding this knowledge he attempted to open the knuckle with the pin-lifter at the time of the accident and before he went behind the tender. He did not mention the fact that the coupler was defective to his friends, nor did he speak of that fact when he was asked by the witness, Donan, in the presence of defendant's superintendent, Hed-

rix, as to how the accident occurred, nor did he think of this significant fact when he made his affidavit for claim against the insurance company before the witness, Purvis. He admits he never spoke of the alleged defective coupler to anyone, friend or foe, until he talked with his attorneys some months after the accident. Then it was he remembered that the coupler would not work and that he had been injured by reason thereof.

Plaintiff testified in his own behalf on direct examination as follows (Rec. 19-20):

"Q. Mr. Moore, state whether or not this engine was equipped with any coupler, automatic coupler, designed to couple by impact with cars, and be uncoupled without the necessity of men going between them? A. It was not.

Q. I say, did it have on a coupler that had that purpose? A. There was a coupler there for that purpose, but it would not work.

Q. How long had that coupler been out of condition? A. It had been out of condition for two or three days.

Q. Had you notified anybody about its condition? A. I had told the conductor a day or so before that the coupler was not working, or in working order, and he says, 'Well, we will have it fixed'."

On cross examination he said (Rec. 36):

"Q. Now, do I understand you to tell the jury that after you had thrown the switch that you then went to the end of the tender and took hold of the lever to draw the pin and throw the knuckle open so it would couple on to the cars down here? (Indicating on the plat.) A. I did; yes sir.

Q. And you took hold of the lever at the side of the tender, did you? A. At the back end of the tender; yes sir.

Q. That was at one corner of it, was it not? A. Well, it sets in, Mr. Brown.

Q. Well, it sets in a little, but then it is at the corner of the tender practically, isn't it? A. It is at the back end of the tender; yes sir.

Q. And you tried it and it would not work? A. It did not; yes sir.

Q. Well, it would not work, would it? A. It would not work; no sir.

Q. And it had been in that condition for some days, hadn't it? A. Yes sir; it had.

Q. And it would not work at all during those days? A. No sir; it didn't.

Q. Why did you go and try to work it that time, if you knew it would not work? A. Because it is customary for all brakemen and trainmen to take hold of the lever to open the knuckle.

Q. But you knew it had not been working all the time you were out with it? A. Yes sir; that is all right; it is customary to do that, and if it don't open to go in and open it.

Q. I was just asking you if you knew all the time you were out it would not open? A. I knew it would not work; yes sir.

Q. And notwithstanding the knowledge you had that it would not work, you went up and took hold of it and tried to open it with the lever? A. Yes sir; I did."

This was all the evidence offered which in any way tended to show that the coupler was defective. No other witness said or attempted to say that the coupler was, or that it ever had been out of repair, and no fact or circumstance in any way tended to bolster up the improbable statements made by defendant in error.

On direct examination, Roy Pigg, the conductor in charge of the train, testified as follows (Rec. 67):

"Q. Do you know anything about the condition of that tender and coupler on it? A. In good condition.

Q. I asked you if you knew anything about the condition of the tender? A. I was working with the engine there, nothing wrong with the engine that I know of.

Q. Coupler working perfectly? A. As far as I know.

Q. Had you worked it yourself? A. I cannot say whether I had or not—I helped the boys and sometimes I did, but I cannot say whether I did that morning or not."

On cross examination he said (Rec. 77):

"Q. You had been out with that engine four days? A. From sixth to ninth.

Q. This accident occurred in the morning or afternoon? A. In the morning, about 9:15, sometime.

Q. During the time you had been out had you seen any coupling made? A. It had been cut off and coupled onto the train a couple of times that morning.

Q. During the entire trip? A. Many times the four days, 25 or 30 times.

Q. Did you observe the man operating the coupling? A. Don't know that I did, but if anything goes wrong they always notify me.

Q. State whether or not you heard anything that would indicate that the coupling apparatus was out of order? A. Heard no statement to that effect.

Q. So far as you know the coupling apparatus was in good condition? A. Yes sir."

WILLIAM H. TEMPS, the fireman on engine No. 45, said (Rec. 101-102):

"Q. How many days had you been upon the engine as fireman on that trip? I mean during

the time you had it out that time? A. No sir; I don't know how long we had it out.

Q. You don't know how long you had it out? A. No sir.

Q. Tell the jury whether you had ever known of anything being wrong with the coupling device at the rear end of the tender? A. No sir; I don't.

Q. Tell the jury whether you had observed the men, that is the brakeman in charge of your train, doing the switching work, operating the coupler on that trip before that? Had you observed them operating it before that, I mean? A. Before that?

Q. Before Moore was injured? A. No sir; I don't.

Q. I mean, had anybody coupled a car on the rear end of the tender on that trip, or before that? A. Yes sir.

Q. Had you observed the brakeman doing that? A. Yes sir.

Q. I wish you would tell the jury how they did that, whether they went in between and operated it, or whether operated it from the side? A. They operated it from the side.

Q. Did you ever know or hear of anything being wrong with that coupler prior to the time of the accident? A. I had not.

Q. Did you make an examination of the coupler after the accident or look at it at all? A. I have not.

* * * * * * *

Q. Tell the jury whether or not you remained on the engine and brought it into St. Joseph? A. Tell them what?

Q. Whether you remained upon that engine and came into St. Joseph with it? A. Yes sir; I come into St. Joseph with that engine.

Q. Was that the engine that brought Mr. Moore to town? A. Yes sir.

Q. Had there been any repairs of any kind made upon the rear end of that tender before it got to town? A. No sir.

Q. Had there been anything done to it whatever, or any repairs made upon it before these men examined it down there? A. No sir.

Q. When this examination was made down there, tell the jury whether or not you observed whether the coupling worked properly at that time, when the examination was made by these men? A. Yes sir; it worked properly when I saw them work it.

Q. Did you observe anything whatever wrong with it at that time? A. No sir."

Norman Hawkins, engineer on engine No. 45 testified (Rec. 109), that he took the engine out of Hiawatha on Monday preceding the accident about six o'clock, went to Hanover and turned and came back and had the same crew with him all the time consisting of Conductor Pigg, Brakeman Shepard, Brakeman Coy, Fireman Temps and Brakeman Moore.

He said (Rec. 112), that after the accident to Moore he brought his engine on to St. Joseph; that no repairs of any kind were made to the coupling apparatus upon the rear of the tender while the train was at Marysville or in that vicinity, and that there was an inspection right away after the engine stopped in St. Joseph. He said further (Rec. 113), that during the time he had been out on the trip with the engine the brakeman had coupled and uncoupled the cars from the tender a good many times, quite frequently, and that there was nothing wrong with the coupler; that they were always able to uncouple from the side. He was asked:

"Q. Mr. Hawkins, whose duty was it to ascertain and to report any defects that may be upon your engine or tender? A. The engineer.

Q. The engineer? A. Yes sir.

Q. I will ask you to state whether anyone ever at any time complained to you or suggested to you that there was anything wrong with the coupling device on that tender? A. No sir.

Q. And did you ever know of there being anything wrong with it at any time? A. No sir.

CHARLES IRWINE SHEPARD, one of the brakemen who belonged to the crew working with engine No. 45 on the morning of the accident, testified (p. 265):

"Q. Do you know whether or not there was anything wrong with the coupling apparatus on the rear of that tender? A. No sir.

Q. Did you ever hear or have any suggestion or any intimation to the effect that there was anything wrong with it at all? A. No sir.

* * * * * * *

Q. Tell the jury whether or not couplings were made frequently or otherwise on that trip? A. Yes, I suppose they were. They could not work without making couplings."

He further said that he came to St. Joseph with the engine that brought Mr. Moore in and that there was nothing done to the coupling apparatus after the accident and before the engine reached St. Joseph; that the tender of the engine was coupled to the caboose after the accident (p. 266). Witness did not remember who made the coupling, but it was either himself or Mr. Coy, the other brakeman, and that he neither observed nor heard of any trouble in making the coupling.

C. F. COY, another brakeman who belonged to the crew working with engine No. 45 on the date

of the accident, testified as follows (Rec. 138-139-140):

"Q. Have you ever made any coupling to the tender upon this engine upon this trip, that is, this time you were out with it, have you made any couplings yourself? A. I could not say whether I had coupled to the engine or not.

Q. I mean, to the tender, to the rear end of the tender? A. Yes sir; I understand what you mean, but I don't remember positively of making any couplings.

Q. Did you ever hear or have any reason to believe or to know that the coupling apparatus upon that rear end of the tender was in any way defective or out of order? A. No sir.

Q. Had you ever heard of any complaint being made of that kind during the time you were working with or around the engine? A. No sir.

Q. I asked you the question, if you ever coupled onto it and you said you did not recall. Did you ever uncouple anything from the tender? A. I cut the engine off.

Q. When was that? A. Just before it went down over the switch.

* * * * * * *

Q. And in doing that, did you use the coupling device on the rear end of the tender? A. Yes sir.

Q. Tell the jury how you did it? What method you proceeded to uncouple it? A. Just took hold of the lever and lifted it up.

Q. I wish you would tell the jury whether or not it acted properly when you did it? A. It did.

Q. Do you know where the engine and tender were taken after they came into the city? A. I cut the engine off of the caboose in the yard, and went to the round-house and went that way.

Q. Did you cut the caboose off from the tender yourself down there? A. Yes sir.

Q. When you came in? A. Yes sir.

Q. I wish you would tell the jury if you had any trouble of any kind or character in cutting the caboose off from the tender at that time? A. I did not.

Q. Tell the jury how you did it. A. By lifting the pin.

Q. From the side or— A. From the side.

Q. With the lever prepared for that purpose? A. Yes sir."

He further said he did not remember who coupled the caboose on to the tender at Marysville, but that it was either himself or Mr. Shepard; that he had never had any trouble in coupling a car to or uncoupling a car from the tender and that there was nothing wrong with the coupling at the time of the accident.

J. F. FOREST, round-house foreman for the Great Western Ry. Co., testified that on the 9th of June he was asked to make an inspection of engine 45 for The St. Joseph & Grand Island Railway Company and that in company with the car foreman of the Great Western Ry. Co., and Mr. Slayton, the master mechanic of the Grand Island Ry. Co., he made such inspection in the terminal yards in the City of St. Joseph (Rec. 144).

"Q. What inspection did you make of the coupling apparatus? A. I opened the coupler several times.

Q. Did you make any other examination of it, look to its parts? A. And inspected the coupler and knuckle and everything worked all right.

Q. I wish you would tell the jury whether or not the pin or any part of the coupling device was bent or otherwise out of order in any way? A. No, it was not.

Q. Tell the jury how the coupling device worked, whether it would work with the lever at the side or otherwise? A. It worked with the lever from the outside. You could stand from the outside and pull it from the outside and raise the lock pin and open the knuckle the full width."

C. H. CONKWRIGHT, general foreman of the Rock Island R. R. Co. at St. Joseph, testified that he examined the tender of engine 45 when it came in to St. Joseph from Marysville on June 9. (Rec. 149-150.)

"Q. In the inspection of the engine that you made there, did you examine the coupling device? A. I did.

Q. I wish you would tell the jury how it worked and whether it was defective in any way, and if so, in what way, just tell the jury all about it. A. It was not defective; it was operative.

Q. When you say it was operative, you mean from what position could you operate it? A. From the pin-lifter.

Q. Did you find anything bent about the coupling apparatus or defective in any way whatever? A. I saw nothing bent when I examined it.

Q. You say that it was operative. You mean it was operative with difficulty, is that the idea, it was hard to operate? A. No sir.

Q. What do you mean when you say it was operative? A. Take hold of the end of the pin-lifter and the knuckle would come open.

Q. Just without a bit of trouble? A. It was operative."

* * * * * * *

"Q. Did the coupler—did the pin-lifting rod that you examined, sag down in the center? A. No sir.

Q. It was perfectly straight clear across the rear end of the engine? A. Yes sir.

Q. You are positive of that? A. Yes sir.

Q. You swear positively to the jury? A. Yes sir.

Q. There could be no mistake about that, that the pin-lifting rod was horizontal, and did not sag in the center? A. No sir.

H. C. DIETRICKSON, engine inspector for the Burlington R. R. Co., testified that he examined engine 45 in company with Mr. Conkwright, Mr. Forest and Mr. Slayton on June 9, 1910. (Rec. 153-154-156.)

"Q. How was the coupling device on the engine operated or on the tender operated, I mean? That is, was it an automatic device or how was it? A. It was an automatic, and had what we call a lever, a coupling lever fastened to a lifter with a chain, and a clevis.

* * * * * * *

Q. At the time you were down there, did you inspect or examine the coupling device on this engine? A. Yes sir.

Q. I wish you would tell what you did, and how you examined it, what inspection you made? A. One man that was a train man got up on the stirrup and he operated that pin-lifter to show that the knuckle would open. I think he tried it three times, and each time it opened as good as any coupler could, and also got down on the ground and operated it from the ground, standing outside of the rail, where the train man or anyone that operated a coupler would stand.

Q. Did you examine the coupler to ascertain whether anything was bent or out of order or defective? A. There was nothing defective about it."

F. T. SLAYTON, of Norfolk, Virginia, superintendent of motive power of the Virginian Railway, but who was connected with The St. Joseph & Grand Island Railway Company as superintendent at the time of the accident, testified that as such superintendent he had charge of the rolling stock of the railway company and was acquainted with engine No. 45, and that he was at the Sixth Street crossing in St. Joseph, Mo., when the engine and caboose arrived with Mr. Moore on the afternoon of June 9; that he went with the other parties who examined the engine (Rec. 162-163):

"Q. And in what condition did you find the coupling apparatus at that time? A. It was working perfectly, from either side of the engine.

Q. And was this engine equipped with an automatic coupler? A. Yes, the automatic coupler, with an uncoupling lever, extending across the rear of the tank, so that it could be operated from either side.

Q. Without going in between the cars to operate it? A. There was no necessity whatever for going between to operate it.

Q. Did you use the device attached to this coupler to ascertain whether or not you could operate it from the side of the tender, without going back to the knuckle? A. Yes, from both sides of the tender, standing on the ground, and also by standing on the step, the sill step of the tender, on either side.

Q. Had there been anything wrong with the coupling device attached thereto upon this engine, at any time prior to the time of this accident, so far as you know? A. None that I know of.

Q. Mr. Slayton, you spoke of this being an automatic coupler. I wish you would describe the character of the coupler upon the engine, and whether or not it was installed under your supervision, and state why you selected this pattern of

coupler? A. This was the Climax type of automatic couplers, which I had decided upon as a standard for our engines and cars, after having tested out a number of different couplers, and one of the main reasons for deciding to adopt this type of coupler as standard was the knuckle could be opened the full distance, from any position, without touching it with the hand. There is some make of couplers, while they would work well from fully closed position, when the uncoupling lever was operated, should the knuckle only be partly closed, you could not open them well except by taking hold of them with your hand, while this type and form of the unlocking device was such as to enable a person to open the knuckle fully, from any intermediate position. That one, I made the test, and found that it did operate the knuckle from any position between full closed, and partially open. In fact, I found the coupler in perfect working condition in every respect."

J. W. TWEDELL, car foreman for plaintiff in error, testified in part as follows (Rec. 172):

"Q. While you were with the company and prior to the time of this accident, did you ever know or hear of anything being wrong with the coupling device or with the tender of engine 45? Did you ever have any knowledge of that kind from any source whatever that it was defective or out of order in anyway? A. No sir, I did not."

C. E. HEDRIX, superintendent of plaintiff in error, testified that he was familiar with engine 45; that he saw and inspected it on June 10, following the accident and that at the time he made such inspection he saw no evidence of any repairs to the rear end of the tender (Rec. 181-182):

"Q. I wish you would tell the jury in what condition the coupling device was at the time you made the inspection? A. It was in as nearly as perfect condition as it would be possible to have it.

Q. Did you attempt to operate the lever, the pin-lifting lever? A. I tried the uncoupling device, and closed the knuckle and uncoupled it repeatedly in every different position that it would be possible for it to be in."

A. E. ALBERTS, car foreman of the Great Western R. R. Co., said he was called to make an inspection of engine 45 on June 9th, and did so. He made the inspection in company with Witnesses Forest and Slayton. Among other things he said (Rec. 194):

"Q. I wish you would tell the jury what you did, how you examined it, what the nature of your examination was? A. I took the pin-lifter out on the outside and worked it, and the coupler worked together, locked them open and the knuckle opened up.

Q. I wish you would tell the jury whether there was anything defective or out of order about the pin-lifting rod, the pin or the coupler or anything else? A. I looked everything over particularly and I could not find anything."

C. E. HEDRIX, superintendent for plaintiff in error, testified (Rec. 182-183-184), that he called to see Mr. Moore at the hospital several times; that some question came up about his insurance, "in fact I was either told or word was sent to me that he had lost his identification card in the insurance company and requested that I write the insurance company about it. I don't recall that was an individual request made by him to me direct or indirectly through someone else, but at any rate I started from that and had more or less relation with him regarding his insurance, and then I called on him individually after that was settled several times and saw him."

"Q. Did you ever at any time undertake to quiz Mr. Moore to ascertain anything about his troubles yourself, personally? A. No sir.

Q. Were you ever present when anyone else asked Mr. Moore how he happened to be injured? A. Yes, I was present at the time that the insurance adjuster visited Mr. Moore and paid him his insurance and at that time * * *

Q. Did you hear any conversation between Mr. Donan (insurance adjuster) and Mr. Moore at that time with respect to how Mr. Moore claimed he was injured, and if so, I wish you would tell the circumstances of the conversation and what he said? A. I was present all the time. Mr. Donan asked a number of questions leading up to the way the insurance had been paid for; in fact there was some money yet due, and finally asked Mr. Moore how he got injured, and in reply to that Mr. Moore stated that he did not know.

Q. Did you hear him say anything further as to what he did, what the engine was doing? A. He stated that the engine was backing up, and he went in behind it.

Q. Did he say what for or anything of that kind, Mr. Hedrix? A. I don't recall that he did or did not particularly about that.

Q. Did he say anything about how he happened to trip or fell or anything of that kind? A. No; Mr. Donan asked him about that and he said he did not know, that things were coming too fast for him, if I remember his exact words; I believe that was what he said."

JAMES H. DONAN testified in part as follows (Rec. 197-198):

"Q. What is your business? A. General adjuster.

Q. For what company? A. Continental Casualty Company.

Q. How long have you been general adjuster for the Continental Casualty Company? A. About twenty-five years.

Q. Are you acquainted with Mr. Ralph Moore, the plaintiff in this case? A. I can't say that I am acquainted with him.

Q. Have you ever seen him? A. Yes sir.

Q. At the time he was injured while employed by the Grand Island, did he carry any accident insurance in your company? A. Yes sir.

Q. State whether or not you came to St. Joseph for the purpose of making adjustment on that policy? A. The claim was sent in for adjustment.

Q. And did you come here? A. Yes sir; and I came here to St. Joseph, as there were some matters connected regarding the payment of premiums, and I went to the railroad auditor's to look up and satisfy myself as to whether those installments had been paid—I went from there to the hospital and found Moore at the hospital.

Q. Did you have any conversation about the accident, and if so, state what it was? A. After the preliminary, the introduction, and so forth, I asked Moore the flat question as to how this accident occurred and he told me that he did not know, nor could he explain it to me—he stated that he was taking the engine on the siding and got hold of the corner of the tender, after which he did not remember anything else—could not tell me how it happened at all, did not know.

Q. Did he tell you whether or not the engine was running or standing still? A. He told me he was taking the engine on the siding—going in on his signal—they were going in there after a car, he told me that, but as to how the accident happened he said he did not know.

Q. At what hospital did this occur? A. I think at St. Joseph Hospital, I never had been in the hospital before.

Q. And how long after the accident was it you had this conversation with him? A. My conversa-

tion with him took place on the 12th day of July, 1910."

M. A. HARTIGAN, Jr., testified that at the time of the accident he was assistant superintendent of the plaintiff in error and that after defendant in error had been brought to the hospital in St. Joseph the witness called upon him two or three times and that on these occasions the question as to the cause of the accident was discussed. On this subject the witness testified as follows (Rec. 160-161):

"Q. Do you know what was done with Mr. Moore after the accident occurred? A. Yes sir.

Q. Just state, please? A. He was brought to St. Joseph and put in the Sisters' Hospital, under the car of Dr. Wallace, our chief surgeon, and Dr. Todd, his assistant.

Q. After Mr. Moore had been operated on, and was convalescing and able to sit up, or be up, did you visit him at the hospital, and if so, about how often? A. I think about twice. The first time two or three days after the accident, and the second time probably a couple of weeks. I cannot remember now.

Q. During the last visit, that you have referred to, did you have any conversation with Mr. Moore as to how the accident had occurred? A. I had a conversation both times.

Q. I wish you would proceed and state, in your own language, what you said to him, and what he said to you, on the two occasions you have named, starting with the first—I mean with respect to how the accident occurred? A. I asked him how he happened to get caught in that way. He said that the engine had passed down over the switch; he had thrown the switch, and signalled them to back up. He started across the track, around behind the engine, as it was backing up, and in some way he stumbled and fell; that he did not know exactly how he tripped or stumbled,

but that he went down. He further said that he did not think they would ever catch him.

Q. During the second visit that you made to Mr. Moore, which you say was some two weeks after the first, did you, at that time, have any conversation with him about how the accident had occurred? A. On both occasions we talked about this accident.

Q. And on the second occasion that you were there, did he again state to you how it occurred? A. Yes sir; he stated again that the engine was backing up and he walked around the end of the tender to get on the other side of the track and stumbled and fell."

Defendant in error carried a policy of accident insurance with the Continental Casualty Company. (Rec. 197.) In order to collect the insurance money due to him by reason of his injuries, it became necessary for him to make and submit to the insurance company an affidavit stating what he was doing at the time of the accident, and the cause thereof. This affidavit was made before W. N. Purvis, a notary public, on the 28th day of June, 1910, and in reply to the question: "What were you doing at the time injury was received, and how did it happen?" defendant in error replied: "*Taking engine on to siding to couple on to cars*—doing local switching, fell in front of tender and was run over by tender of engine; *engine was backing up.*" (Rec. 202.)

In reply to the question: "Have you given all the facts relative to the manner in which this injury was received?" defendant in error replied: "Yes." (Rec. 203.)

In the affidavit defendant in error further stated: "I, the undersigned, do hereby warrant the foregoing answers and statement to be correct and true, without evasion or reservation," etc. (Rec. 203.)

On cross examination defendant in error at first feebly attempted to deny that he had given the answers above quoted, but afterwards admitted that the answers were absolutely true, and that when asked by Purvis to tell how the accident had occurred, he did not even mention the fact that the coupler upon the tender was defective; that he never mentioned this fact to a living soul until he mentioned it to his attorneys *some two months* after the accident had occurred. (Rec. 47-48-49.)

That the testimony given by defendant in error was wholly unreliable and unworthy of belief for any purpose is further evidenced by the fact that he testified that the engine was *standing still* when he went behind the tender, and that while attempting to open the coupler the engineer backed the tender upon him without a signal and without warning. (Rec. 23-24.) This evidence was given in support of the allegations contained in his petition, and he doubtless deemed it necessary to so testify in order to make out a cause of action against the plaintiff in error.

That this portion of the testimony of defendant in error was absolutely untrue is shown by his own words and his own conduct, by the testimony of all the witnesses to the accident and by every credible fact and circumstance in evidence. He told the Witness Donan (Rec. 97-98), the adjuster for the insurance company in which he carried insurance, that when the accident occurred he was taking the engine in on the siding—"*going in on his signal*—they were going in there after a car, he told me that, but as to how the accident happened he said he did not know."

The Witness Hedrix was present when Donan interviewed defendant in error, and he corroborated the statements made by Donan. (Rec. 182-183.) In reply to the question, "Did you hear him say anything further as to what he did, what the engine was doing?" the witness answered: "He

stated that the engine was backing up and he went in behind it." In reply to the further question: "Did he say anything about how he happened to trip or fall, or anything of that kind?" the witness said: "No, Mr. Donan asked him about that and he said he did not know, that things were coming too fast for him, if I remember his exact words I believe that is what he said." (Rec. 184.)

M. A. Hartigan, formerly employed by the plaintiff in error as assistant superintendent, but with the Virginian Railway Company at Norfolk, Virginia, at the time of the trial in the Court below, testified that he called upon defendant in error while confined in the hospital in St. Joseph, on two different occasions, and conversed with him about the accident; that on these occasions he conversed with defendant in error about his injuries, and asked him how he happened to get caught; that defendant in error told him that the "engine had passed down over the switch; he had thrown the switch and signaled them to back up. *He started across the track around behind the engine as it was backing up*, and in some way he stumbled and fell; that he did not know exactly how he tripped or stumbled, but that he went down. He further stated that he did not think they would ever catch him." (Rec. 161.)

In the affidavit filed with the insurance company by defendant in error he stated that he fell in front of the tender *while the engine was backing up.* (Rec. 202.) When testifying he admitted that he had made the afifdavit and that when he was asked as to the cause of the accident, and how he happened to be injured, he did not mention the fact that he had gone behind the tender while it was stationary, and that the engineer had backed the engine without a signal. (Rec. 49.)

He further admitted that when the witness, Donan, asked him how he got hurt he answered,

"I told the gentleman *as the engine was backing up*— the engine backed up—and I tripped, that is what I told the gentleman." (Rec. 44.)

In addition to the admissions made by defendant in error, and his unnatural conduct in failing to mention the fact that the engine was stationary when he went behind the tender until some two months after the accident, when he confided this fact to his attorneys, every member of the train crew, his friends and companions, testified that *the engine was moving upon his signal* at the time of the accident, and that *while the tender was in motion* he attempted to pass behind it and for some reason stumbled and fell and was caught by the tender.

Roy Pigg, the conductor, testified that defendant in error gave the signal for the engine to back up, and that he stepped behind the tender while it was in motion and stumbled and fell. (Rec. 63-64.)

George Miller, a section foreman, was within a few feet of defendant in error at the time he was injured, and witnessed the accident. He testified that defendant in error gave the engineer a "back-up" signal, and that while the engine and tender were backing up defendant in error went behind the tender and was caught and injured. (Rec. 80-81.)

William Temps, the fireman upon the engine, testified that defendant in error gave a "back-up" signal; that the witness communicated the signal to the engineer; that as the engine was backing up in response to this signal, defendant in error went behind the tender and was injured. (Rec. 26-27.)

Norman Hawkins, the engineer, testified that the Fireman Temps was upon the side of the engine where he could see defendant in error, and

that the fireman told the witness to back the engine.

The evidence to the effect that defendant in error went behind the tender *while it was in motion* was so overwhelming in its character, and the testimony of defendant in error to the effect that the tender was *stationary* when he went behind it was so *improbable and unbelievable,* that counsel did not even ask to have submitted to the jury the question of the alleged negligence of plaintiff in error in causing the engine and tender to be backed after defendant in error had gone behind the tender while it was stationary.

Instruction numbered one, given in behalf of defendant in error, is the only instruction asked by him which submitted to the jury the question of the negligence of plaintiff in error, and in that instruction the alleged negligence of plaintiff in error in causing the engine and tender to be backed without a signal was entirely omitted. (Rec. 239.)

We believe that the only fair and reasonable inference which may be drawn from the fact that such a flagrant act of negligence as that alleged by defendant in error was not submitted to the jury, is that counsel realized that the testimony of their client was unreasonable, without substance, and unworthy of belief.

As further evidence that the testimony of defendant in error was unworthy of belief, he testified positively and emphatically that there was not, upon the rear end of the tender which backed upon him, any grab-iron of any character (Rec. 19), when the photograph introduced in evidence as defendant's Exhibit "C" (Rec. 149), and all the evidence in the case, including the evidence of the experts who examined the tender when it came into St. Joseph, flatly contradicted all that defendant in error had said with respect to the lack

of grab-irons, and showed positively and conclusively that he had either been mistaken, or that he had deliberately testified falsely when he said there were no grab-irons upon the rear end of the tender. (Rec. 68-69, 141, 149, 154, 172, 182, 196.)

All the evidence shows that there was an upright grab-iron at each corner of the rear end of the tender, and that there was an iron ladder which extended up the center of the rear end of the tender, and that in addition to these facilities the pin-lifting rod was used by the employes as a grab-iron. Defendant in error is not criticized, however, for not designating the pin-lifting rod as a grab-iron while testifying. One of the vital questions in the case is, was the pin-lifting rod a grab-iron within the meaning of the law?

The bare unsupported statement of defendant in error to the effect that the coupler upon the tender was defective, when viewed in the light of all the evidence in the case, and when measured by the standard of reason and common sense, is so unreasonable and so inconsistent that it is or should be impossible of belief. That defendant in error, an experienced railroad man, should have known that the coupler upon the tender was defective, and that by reason thereof he was injured and hopelessly maimed for life, and that he should have refrained from mentioning this fact to friend or foe, under the circumstances shown in evidence, until some two months after the accident when he first confided the information to his attorneys, is unthinkable and unbelievable. To all inquirers he said that he went behind the *moving* tender and fell, and that what caused him to fall he did not know. The knowledge that the coupler was defective and that the tender was *stationary* when he went behind it did not come to him until two months after the accident, and he then divulged these secrets to his attorneys.

The engine and tender were attached to the train which brought defendant in error to St. Joseph after he was injured. Other employes coupled cars to and uncoupled them from the tender immediately after the happening of the accident, and all the train crew said that the coupler was in perfect working order, and that it would couple automatically by impact.

Many expert disinterested railroad men, employes of other railroads, were waiting to inspect the tender as soon as it arrived in St. Joseph. Upon its arrival they made an inspection and found the coupler in the best posible condition of repair. There was no pretense that the coupler was in any way repaired, or that it could have been repaired before it arrived in St. Joseph, and the evidence showed positively that no such repairs were made.

If, under such facts and circumstances as are quoted and shown above, one may, under the guise of the law, take from another that to which he is not entitled, legally or morally, then the rule that one must prove his case by at least *some credible* evidence, is a farce, a myth and a mirage, and no man may call any vine or fig tree his own. A case bottomed upon such facts or want of facts has no place in a court of justice, and the sooner and oftener the courts so declare the sooner will the moral health of litigants improve.

The rule is well settled that before evidence may have the necessary probative force or effect upon which to bottom a verdict, it must have actual substance and relative consequence, and it must appeal to the reason. "When the facts are undisputed or clearly preponderant, the question of negligence is one of law."

The scintilla doctrine is no longer followed by this Court.

Southern Pac. Co. vs. Pool, 160 U. S. 438, 40 L. Ed. 485.
Hart vs. Northern Pac. Ry. 196 F. 180, 116 C. C. C. 12.
Pleasants vs. Faut, 22 Wall. 116, 22 L. Ed. 780.
Noble vs. C. Crane & Co., 169 F. 55, 94 C. C. A. 423.
Toledo St. L. & W. R. Co. vs. Howe, 191 F. 776, 112 C. C. A. 262.
Virginia & S. W. Ry. Co. vs. Hawk, 160 F. 348.
N. Y. C. & H. R. Co. vs. Difendaffer, 125 F. 893, 62 C. C. A. 1.
Postal Tele. Cable Co. vs. Grantham, 187 F. 52, 109 C. C. A. 370.
Haskell vs. Columbus Savings & Trust Co., 207 F. 322, 125 C. C. A. 72.
Zilbesher vs. Pa. R. Co. 208 F. 280, 125 C. C. A. 480.
Texas & Pac. Ry. Co. vs. Cox, 145 U. S. 593, 362 L. Ed. 829.
Kane vs. Northern Central R. Co. 128 U. S. 91, 32 L. Ed. 339.
Schuylhill Etc. Imp. Co. vs. Munson, 14 Wall. 442, 20 L. Ed. 867.
Ozenne vs. Ill. Cent. R. Co. 151 F. 900, (Affirmed) 157 F. 1004, 85 C. C. A. 678.
Berry vs. Chase, 146 Fed. 625, 77 C. C. A. 161.
Mt. Adams Et. Co. vs. Lowery, 74 Fed. 463, 20 C. C. A. 596.

This Court, in Southern Pacific Company vs. Pool, *supra*, speaking through Chief Justice White, said:

> "There can be no doubt where evidence is conflicting that it is the province of the jury to determine from such evidence the proof which constitutes negligence. There is also no doubt, where the facts are undis-

puted or clearly preponderant, that the question of negligence is one of law."

Commenting upon the Pool case, *supra*, the Circuit Court of Appeals for the Eighth Circuit, in the case of Hart vs. Northern Pacific Railway Company, *supra*, said:

> "The Supreme Court had before that time in repeated cases held that the Court might withdraw a case from the jury and direct a verdict for the plaintiff or the defendant where the evidence was undisputed, 'or of such conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.'
>
> In the early case of Improvement Company vs. Munson, 14 Wall. 442, 448, 20 L. Ed. 867, that Court distinctly disapproved of the 'scintilla doctrine,' saying:
>
> 'But the recent decisions of high authority have established a more reasonable rule (than the scintilla rule) that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'
>
> In Herbert vs. Butler, 97 U. S. 319, 320, 24 L. Ed. 958, Delaware, etc. Co. vs. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, Elliott vs. Chicago, Milwaukee & St. Paul Ry., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and Patton vs. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the Court reaffirmed the doctrine of the Munson case, but no criterion was suggested for determining what evidence was of such 'conclusive character' as to warrant the summary action of the Court in directing a verdict. In view of that fact the Pool case becomes peculiarly instructive. It is there said: 'Where the facts are undisputed or clearly preponderant' the question of negligence becomes one of law. We have heretofore in the cases of Chicago & N.

W. Ry. Co. vs. Andrews, 64 C. C. A. 399, 130 Fed. 65, Patillo vs. Allen-West Commission Co., 65 C. C. A. 508, 131 Fed. 680, 686, followed the doctrine of the Pool case, and held that under circumstances like those of the present case it was the duty of the trial court to treat the question involved as one of law and not of fact. See to the same effect the very recent case of Chicago Junction Ry. Co. vs. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. ———, decided December 11, 1911, and also Mt. Adams, etc. Inclined Ry. Co. vs. Lowrey, 20 C. C. A. 596, 74 Fed. 463."

In the case of Noble vs. Crane & Company, *supra*, Judge Tayler, speaking for the Circuit Court of Appeals, Sixth Circuit, said:

> "So that it is the duty of the Court to direct a verdict, unless the conflict is positive. The conflict must be real, not merely apparent. A mere dogmatic assertion, which does not appeal to the reason of the Court, which does not have substance and relevant consequence, which does not have fitness to induce conviction, is not proof, even if uncontradicted, and does not interfere with the duty of the Court to direct a verdict."

Judge Lurton, in the case of Railway Company vs. Lowery, *supra*, said, that it is the duty of the judge on a motion to direct a verdict "to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party."

Judge Severens, of the Circuit Court of Appeals, in the well considered case of Minahan vs. Grand Trunk Western Railway Company, *supra*, declared the law as follows:

"And by 'evidence' we mean something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the qualify or 'proof' or having fitness to induce conviction."

Mr. Justice Miller, in the early case of Richard H. and Jacob H. Pleasants vs. Hamilton G. Fant, *supra,* said:

"It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in those issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the duty of the province of the Court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the Court after a verdict to set it aside and grant a new trial. Must the Court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plain-

> tiff, the Court should say so to the jury. In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the Court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict."

Following the rule announced in Pleasants vs. Fant, *supra*, this Court has, in the later case of McGuire vs. Blount, *supra*, said:

> "It is strenuously urged that, whatever the merits of the controversy, there was sufficient proof to require the trial Court to submit the case to a jury; but no rule is better established in this Court than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that, where a Court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not await the enforcement of its view by granting a new trial."

The rules of evidence prevailing in Federal Courts will govern in the determination of the question of the sufficiency of the evidence to justify the submission of the case to the jury, rather than any rule prevailing in the courts of the state where the case was tried.

> Central Vermont Ry. Co. vs. White, 238 U. S. 507, 59 L. Ed. 1433.

The question as to whether the evidence is sufficient to go to the jury in a case founded on a Federal Statute is a federal question, which will be reviewed by the Supreme Court on a writ of error to the highest court of a state.

> Seaboard Air Line Ry. Co. vs. Padgett, 236 U. S. 668, 59 L. Ed. 777.

Kansas City Southern R. Co. vs. C. H. Albus Com. Co., 223 U. S. 573, 56 L. Ed. 556.

Creswill vs. Grand Lodge, K. of P., 225 U. S. 246, 56 L. Ed. 1074.

Washington, ex rel., O. R. & N. Co. vs. Fairchild, et al., 224 U. S. 510, 56 L. Ed. 863.

North Carolina Rld. Co. vs. Zachary, 232 U. S. 248, 58 L. Ed. 591.

St. Louis I. M. & S. Co. vs. McWhirter 229 U. S. 276, 57 L. Ed. 1186.

Delk vs. St. L. & S. F. Ry. Co., 220 U. S. 580, 55 L. Ed. 590.

Central Vermont Ry. Co. vs. White, 238 U. S. 507, 59 L. Ed. 1433.

(b) Defendant in error alleged in his petition that while the engine and tender were stationary he went behind the tender for the purpose of opening the coupler which had become defective to such an extent that he could not open it with the pin-lifting rod and appliances, and that while attempting to open such coupler the tender was backed upon and over him without any signal having been given by him for the backing of the engine. (Rec. 7-8-9-10.)

In support of his petition, upon direct and cross examination, defendant in error testified in the most positive terms that he went behind the tender *while it was standing still;* that he gave no signal for the engine to back, and that while attempting to open the coupler the tender was backed over him without a signal, and without warning of any character. (Rec. 23-24.)

Whether defendant in error went behind the tender while it was stationary or while it was in motion was the vital question at issue. Upon that theory his case was bottomed. It was at no time contended that the coupling device or grab-irons

or lack of grab-irons caused the tender to back over him.

If defendant in error was entitled to recover under the first count of his petition, it was upon the testimony adduced in support thereof. He could not allege and prove one cause of action, *and recover upon an entirely different theory.* His instruction entirely ignored the allegations of his petition and the testimony given in support thereof, to the effect that he had gone behind the tender while it was *stationary* and that it had been backed upon him without a signal, and it authorized a verdict in his favor if the jury should believe that *by reason of a defective coupling device and insufficient grab-irons the tender ran against, upon and over him.*

The instruction was a total departure from the issues presented under the first count of the petition. It was nowhere alleged that the tender was backed upon defendant in error by reason of a defective coupling apparatus or insufficient grab-irons. According to the allegations of the petitions the engine was backed *because of the negligence of the employes of plaintiff in error in charge thereof,* and defendant in error was caught and injured by reason of the *backing of the engine* and not because a defective coupling apparatus or insufficient grab-irons *caused the engine to back.*

The instruction was a clear departure from the issues presented by the petition and the proof, and the trial court committed error in giving, and the Supreme Court of Missouri committed error in approving it.

American Rld. Co. of Porto Rico vs. Didrickson, 227 U. S. 145, 57 L. Ed. 456.

Dome City Bank vs. Barnett, 184 Fed. 607, 106 C. C. A. 611.

Grady vs. St. Louis Transit Co., 169 Fed. 400, 94 C. C. A. 622.
Beaver Hill Coal Co. vs. Lassilla, 176 Fed. 725, 100 C. C. A. 283.
Frizzell vs. Omaha St. Ry. Co., 124 Fed. 176, 59 C. C. A. 382.
Nevada Co. vs. Farnsworth, 102 Fed. 573, 42 C. C. A. 504.
Morris vs. Beach, 191 Fed. 34, 111 C. C. A. 566.

(c) There was no evidence tending to prove that the alleged defective coupler and the alleged lack of grab-irons caused the tender to back upon and injure defendant in error, and it was error to submit those questions to the jury under the first count of the petition.

A defective coupler and insufficient grab-irons would have been entirely harmless and incapable of inflicting the injuries complained of had the engine and tender been standing still. *It was the backing of the engine without a signal,* according to the allegations of the petition and the proof, which caused the accident. That was the moving, proximate cause of the injuries sustained, and it was error for the trial court to give, and for the Supreme Court of Missouri to approve an instruction which omitted the question of the backing of the engine and which was not supported by the evidence. (See evidence quoted and authorities cited under "A", *supra.*)

III.

THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTION MARKED "A," REQUESTED BY PLAINTIFF IN ERROR, AND THE SUPREME COURT OF MISSOURI ERRED IN APPROVING THE ACTION OF THE TRIAL COURT IN REFUSING THE INSTRUCTION.

Both counts of the petition were bottomed upon the alleged negligence of plaintiff in error in

causing its tender to be backed upon and over defendant in error, without his having given a signal for the backing of the engine. (Rec. 7-8-9.) It therefore necessarily follows that if our criticism of instruction numbered one, under sub-divisions (b) and (c), of our Point II, *supra*, are well founded, error was committed by the trial court, and the Supreme Court, as alleged.

IV.

THE TRIAL COURT ERRED IN MODIFYING INSTRUCTION NUMBERED THREE, REQUESTED BY PLAINTIFF IN ERROR, AND IN GIVING THE INSTRUCTION AS MODIFIED, AND THE SUPREME COURT OF MISSOURI ERRED IN APPROVING THE ACTION OF THE TRIAL COURT IN MODIFYING AND GIVING SUCH INSTRUCTION. THE SUPREME COURT FURTHER ERRED IN HOLDING THAT THE SAFETY APPLIANCES ACT DID NOT PERMIT THE USE OF THE PIN-LIFTING ROD AS A GRAB-IRON. (4th and 5th Assignments of Errors. Rec. 282-283.)

Instruction numbered three, as given, after having been modified by the addition of the words in italics, is as follows:

The Court instructs you that at the time plaintiff was injured, the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employes in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law,

and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employes while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employes, while in the performance of their duties, in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance of such work, *and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars*, then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employes, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender.

Under this instruction it will be seen that it was the duty of the plaintiff in error to have the rear end of its tender equipped with attachments or devices which would make the coupling or uncoupling of the tender *reasonably safe under all circumstances*. The law imposed no such obligation upon the defendant. Section 4 of the Safety Appliances Act is as follows:

> "That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides

of each car for greater security to men in coupling and uncoupling cars."

Under the provisions of this Act all that plaintiff in error was required to do was to place handholds or grab-irons upon the end of its tender for *"greater security to men in coupling and uncoupling cars,"* and when it had performed this duty it had complied with the law, whether danger had been eliminated or otherwise. Well may the jury have thought and found that the appliances provided by the plaintiff in error did not furnish *reasonable security* to employes, though they may at the same time have thought that such appliances *were in all respects as safe as those which defendant in error claimed should have been upon the tender.* To state that the law required the plaintiff in error to equip its tender with grab-irons or hand-holds which would at all times *furnish reasonable security to employes, is to state an absurdity,* and to permit the jury to determine whether the appliances furnished by the plaintiff in error provided reasonable security to such employes was likewise a flagrant violation of the rights of plaintiff in error. The Act of Congress imposed no such burden.

The Supreme Court of Missouri in its opinion said (Rec. 261-262):

> "It (The Safety Appliances Act) does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance, so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission. The same act provided for automatic couplers which could be coupled and uncoupled 'without the necesity of men going between the ends of the cars' and separately provided that 'grab-irons or hand-holds' should be placed in the sides and ends of cars used in interstate commerce.
>
> It is clear congress intended to and did require both the automatic coupler, which in-

cluded its uncoupling lever or pin-lifting rod, and, in addition, required grab-irons, or hand-holds to be placed in the ends and sides of cars. The instruction, therefore, was erroneously favorable to appellant in permitting the jury to exonerate it if it had failed to place grab-irons on its tender but had offered a substitute in the form of a pin-lifting or uncoupling rod. That the act did not contemplate such a substitution is clear from its terms. It has been so held by one Federal Court. United States vs. Railway, 184 Fed. 94; United States vs. Railway, 184 Fed. 99. Either automatic couplers, with their uncoupling levers, were in use and upon cars when the applicable Safety Appliance Act was passed or they were not. If they were not in use, it is impossible that congress had them in mind in requiring grab-irons in the end of cars. If they were in use, then the act clearly contemplated grab-irons in addition to them in order to afford employes 'greater security' than was then afforded by whatever appliances were upon the cars. It is true there are decisions which construe the act otherwise, but the cases cited are in better accord with its language and the circumstances attending its passage."

Two of the "decisions which construe the act otherwise," as conceded by the Court, are:

Spokane & I. E. Ry. Co. vs. U. S., 210 Fed. 243.

U. S. vs. Boston & M. R. Co., 168 Fed. 148.

In Spokane & I. E. Ry. Co. vs. U. S., *supra*, Judge Ross, for the Circuit Court of Appeals, Ninth Circuit, approved the following instruction given by the district judge:

"If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known *technically* as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be

afforded by having what would be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant. The law does not require any particular kind of grab-irons or hand-hold to be placed upon the end of the car, but only requires that some such appliance shall be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given. Gentlemen, you have heard the testimony in this case, and you have examined the hand-holds in question, and it is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the act of Congress."

In U. S. vs. Boston & M. R. Co., *supra*, Judge Dodge, charged the jury as follows:

"If at any place in the end of this car there was not a grab-iron or hand-hold properly speaking, but some other appliance, such as a ladder or brake lever, or whatever else you please, which afforded equal security with a grab-iron or a hand-hold at that point, then I shall instruct you that the law has not been violated so far as a grab-iron or hand-hold at that point is concerned. Having something there which performs all the functions of a grab-iron or a hand-hold is just the same thing as having what is properly called a grab-iron or a hand-hold at that point. It may not be possible to say that a coupling lever or a ladder is a grab-iron or a hand-hold, but if it affords the same security to a man who may need to use one that a grab-iron or a hand-hold, properly speaking, would afford, then, in my judgment, the statute has not been violated."

The question involved is vital. It has to do with the legality of a practice followed by all the railroads of the country for years, having the sanction of experts in car building. It is shown by the evidence in this case that if such a practice were unlawful, practically every railroad in the country was violating the law daily at the time of the hap-

pening of the accident complained of, as all railroads equipped their tenders in the same manner as the tender of plaintiff in error was equipped and all pin-lifting rods were used as grab-irons. (Rec. 149-150, 164, 166-172, 179-182, 186-192.)

This Court will take notice of the fact that it was not until March 13, 1911, that the Interstate Commerce Commission *for the first time* designated the *number, dimensions* and *location* of hand-holds, pursuant to the Act of Congress of April 14, 1910, and that in its order designating the character of grab-irons to be used the commission *permitted the substitution of the tread of an end ladder for an end hand-hold or grab-iron.*

If the tread of a ladder may serve the purpose of a grab-iron within the meaning of the Act of Congress, what possible reason may there be for saying that an iron rod which extends entirely across the end of the tender, and is located exactly where grab-irons should be located for the greater security of employes in coupling and uncoupling cars, should not serve the same purpose, although at the same time it be used as a pin-lifting rod? Certainly no safer device could be provided, and none more conveniently or properly located. Under such circumstances does it not seem absurd to say that the rod cannot serve two purposes, and that because it was first designated as a pin-lifting rod it cannot be made to serve the purpose of a grab-iron?

We cannot believe that the conclusions reached by the Supreme Court of Missouri are sound, nor do we believe that such conclusions will be approved by this Court.

V.

THE EIGHTH AND NINTH ASSIGNMENTS OF ERRORS COMPLAIN OF THE ACTION OF THE SUPREME COURT OF MISSOURI IN

DENYING THE APPLICATION OF PLAINTIFF IN ERROR TO TRANSFER THIS CAUSE FROM DIVISION NUMBER ONE OF SAID COURT TO THE COURT, EN BANC, AS PROVIDED IN SECTION 4, OF THE AMENDMENT OF 1890, TO ARTICLE VI OF THE CONSTITUTION OF MISSOURI.

The constitutional provision above referred to is as follows:

> "Sec. 4. *Case transferred to Court, en banc, when.* When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court for its decision; or, when a division in which a cause is pending shall so order, the cause shall be tranferred to the Court for its decision."

The first motion filed by plaintiff in error to transfer the cause of court, *en banc*, was filed on the 30th day of March, 1916, *before* the motion for rehearing in division was determined (Rec. 263), and was renewed in a somewhat more elaborate form in a second motion to transfer filed on the 5th day of April, 1916 (Rec. 270), six days after the motion for rehearing and the first motion to transfer were overruled.

Both the first and second motions to transfer to the court, *en banc*, were overruled without opinion or discussion (Rec. 263, 270), and the action of the Court in overruling the motions was therefore nothing more than a denial of the right asserted by plaintiff in error in such motions.

The Court did not in any sense construe the provision of the state constitution, nor did it determine that plaintiff in error had waived any right it may have had, under this provision of the constitution, by submitting the case to a division of the court for determination. Even had the

state court construed the provision of the state constitution above quoted, this Court will place its independent construction thereon for the purpose of determining whether or not a right guaranteed by the federal constitution has been denied to plaintif fin error.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220.
A. T. & S. F. Ry. Co. vs. Matthews, 174 U. S. 96, 43 L. Ed. 909.

It will be noted from the language of Section 4, of Article VI of the Constitution above quoted, that it is contemplated that motions to transfer to court, *en banc*, shall be filed *after* the cause shall have been submitted to a division. The section says that "when the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of *the losing party* shall be transferred to the court for its decision."

Clearly the words "the losing party" refer to the party losing before the division.

This Court entertained jurisdiction and decided *on its merits* the case of Moore vs. State of Missouri, 159 U. S. 673, 40 L. Ed. 301, where the identical question now under consideration was presented, and where the motion to transfer to court, *en banc*, was filed *after the division had decided the case*. In that case this Court refused to disturb the judgment, on the sole ground that the record *did not clearly show that a federal question was involved in the case*. In that case all questions now presented relating to the transfer of the case to court, *en banc*, were considered, and the right of a losing party to have the case transferred where a federal question is involved was definitely settled.

Federal questions were *necessarily* involved in the instant case from the outset. In fact, the case rests solely upon a federal statute.

Toledo, St. L. & W. R. R. Co. vs. Slavin, 236 U. S. 454, 59 L. Ed. 671.

The decisions of this Court foreclosed the possible contention that the protection of the fourteenth amendment does not extend to the action of the judicial department of the state as well as to other departments thereof.

Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.

Yick Wo vs. Hopkins, *supra.*

Scott vs. McNeel, 154 U. S. 34, 38 L. Ed. 896.

C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226, 41 L. Ed. 979.

For the reasons herein stated, we ask that the judgment and decision of the Supreme Court of Missouri be reversed.

Respectfully submitted,

ROBERT R. BROWN,

Solicitor for Plaintiff in Error

FILED
DEC 11 1916
JAMES D. MAHER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 573

THE ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY.....*Plaintiff In Error*

VERSUS

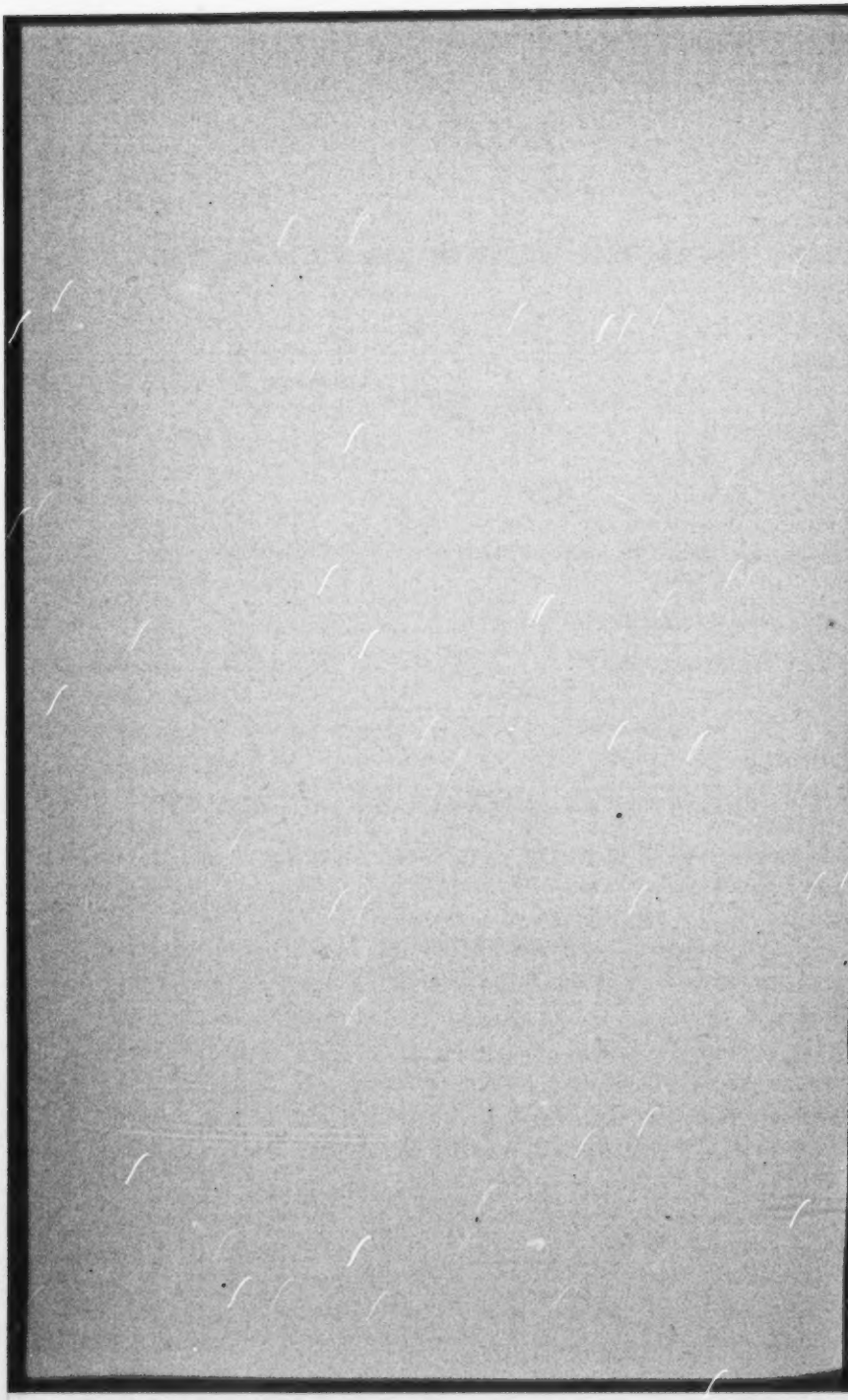
RALPH W. MOORE.....*Defendent In Error*

IN ERROR TO THE SUPREME COURT OF MISSOURI

Statement and Argument of Plaintiff in Error in Opposition to Motion to Dismiss, Affirm or Transfer to Summary Docket.

ROBERT A. BROWN,
Attorney for Plaintiff In Error

NELSON-MORRIS PRTG. CO., ST. JOSEPH, MO.



INDEX

	Page
Argument	6
Notice and Acknowledgment of Service facing page 1.	
Statement	1

AUTHORITIES CITED

A. T. & S. F. Ry. Co., vs. Matthews, 174 U. S. 96, 43 L. Ed. 909..... 18
Armour & Co. vs. Russell, 144 Fed. 614..... 10
C. B. & Q. Rld. Co. vs. Chicago, 166 U. S. 226, 41 L. Ed. 979..... 19
Ex-parte Virginia 100 U. S. 339, 25 L. Ed. 676..... 19
Frost vs. Wenie, 157 U. S. 46, 39 L. Ed. 614..... 11
Gardner vs. Railway Co., 223 Mo. 389..... 10
K. C. S. Ry. Co. vs. Leslie, 238 U. S. 599..... 10
LaMere vs. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068..... 9
Moore vs. State of Missouri, 159 U. S. 673, 40 L. Ed. 301..... 19
Missouri Pacific Ry. Co. vs. Larabee, 234 U. S. 459, 58 L. Ed. 1398..... 20
McMurray vs. Railway, 225 Mo. 272..... 9
Patton vs. Wells, 121 Fed. 337, 57 C. C. A. 551..... 9
Railway Company vs. Needham, 52 Fed. 371, 3 C. C. A. 129..... 10
Railway Company vs. Farr, 56 Fed. 994, 6 C. C. A. 211..... 10
Scott vs. McNeal, 154 U. S. 34, 38 L. Ed. 896..... 19
Seaboard Air Line vs. Padgett, 236 U. S. 668, 59 L. Ed. 777..... 18
Southern Ry. Co. vs. Lloyd, 239 U. S. 496..... 10
Spokane & I. E. Ry. Co. vs. U. S. 210 Fed. 243.....14, 17
Texas & Pacific Ry. Co. vs. Bourman, 212 U. S. 536, 53 L. Ed. 641..... 9
Toledo, St. L. & W. Rld. Co. vs. Slavin, 236 U. S. 454, 59 L. Ed. 671..... 19
U. S. vs. Barnes, 22 U. S. 513, 56 L. Ed. 291..... 11
U. S. vs. Greathouse, 166 U. S. 601, 41 L. Ed. 1130..... 11
U. S. vs. Healey, 160 U. S. 136, 40 L. Ed. 369..... 11
U. S. vs. B. & M. Rld. Co. 168 Fed. 148.....14 and 17
U. S. vs. Levois, 17 Howard 85, 15 L. Ed. 54..... 11
Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220.....18 and 19
York vs. Johnson, 116 Mass. 482..... 9

NOTICE

The defendant in error will take notice that the plaintiff in error will, on or before the 11th day of December, 1916, file in the office of the clerk of the supreme court of the United States the statement and argument hereto annexed in opposition to the motion of defendant in error to dismiss, affirm or transfer to the summary docket.

ROBERT A. BROWN, of St. Joseph, Mo.,

Attorney for Plaintiff In Error

Copy of the foregoing notice and of the statement and argument referred to therein received this.....day of December, 1916.

JOHN G. PARKINSON, of St. Joseph, Mo.,

Attorney for Defendent In Error

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 573

THE ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY.....*Plaintiff In Error*

VERSUS

RALPH W. MOORE.....*Defendent In Error*

IN ERROR TO THE SUPREME COURT OF MISSOURI

Statement and Argument of Plaintiff in Error in Opposition to Motion to Dismiss, Affirm or Transfer to Summary Docket.

STATEMENT

This cause comes to this court on writ of error to the supreme court of the State of Missouri to review the judgment and decision of that court affirming the judgment of the circuit court of Buchanan County, Missouri, in favor of defendant in error for the sum of twenty-five thousand dollars, for injuries sustained by him while employed by the plaintiff in error as freight brakeman and engaged in interstate commerce. The first count of the petition on which the cause was tried and upon which the verdict and judgment were rendered alleged the interstate character of the work being done by defendant in error at the time of the injuries complained of, and alleged that while engaged in the performance of certain switching operations, incident to the handling of interstate commerce, it became necessary for defendant in error to go behind an engine and tender for the purpose of adjusting a coupler which had failed to operate automatically by impact,

in order to prepare it for making the coupling in connection with such switching operation; that while he was in such position the engine and tender were negligently backed without a signal from defendant in error, and that on account of such negligent backing of the engine, and on accout of the defective coupling apparatus, and on account of an alleged lack of grab-irons or hand-holds on the rear end of said tender, defendant in error was run against and caused to sustain the injuries described in his petition.

The accident occurred on the ninth day of June, 1910, and the suit was filed February 3, 1911. Plaintiff in error in due time filed its petition and a sufficient bond for the removal of said cause to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, which includes Buchanan County, Missouri, where the suit was originally filed, alleging among the other grounds for removal the fact that the defendant in error was a resident of St. Joseph, Missouri, within said federal division and district, and that the plaintiff in error was a corporation and a citizen and resident of the State of Kansas and not of the State of Missouri. This application for removal was in due time overruled. (Transcript 3-7.)

At the trial it was admitted that defendant in error was at the time of the accident employed by the railway company in handling interstate commerce, and the applicability of the Federal Employers' Liability Act was conceded.

It was alleged by defendant in error in his petition that there were no grab-irons or hand-holds on the rear end of the tender which backed against and struck him, and that the absence of such grab-irons was responsible for his failure to recover his balance and escape injury, and consequently was a contributing cause to the accident. The evidence introduced by the defendant in error tended to support the allegations of his position to the effect that there were no grab-irons on the rear end of the tender (Transcript 24). The evidence introduced by the railway company was to the effect that an iron rod extended across the rear end of the tender; that it was attached thereto by brackets and that there was a clearance between the rod and the end of the tender of 2½ inches. This rod was designated as a "pin-lifting rod," and was so located

that it could be conveniently grasped by anyone having occasion to work around the end of said tender (Transcript 48). On and prior to June 9, 1910, when defendant in error was injured, it was customary among railroads and their employes to regard such devices as grab-irons or hand-holds, as well as "pin-lifting rods," and where engines, tenders and cars were provided with pin-lifting rods located as the rod in question was located, it was not customary to provide additional grab-irons in the ends of such tenders and cars. (Transcript 164, 169, 172, 179, 182.)

It was shown in evidence that the Master Car Builders' Association, which includes among its members representatives of all the railroad companies in the United States, and which promulgates rules for the guidance of its members, at the time of the accident complained of had in effect a rule which provides as follows:

"(4) Each end of car to be provided with two horizontal hand-holds, not less than twelve inches, and preferably sixteen inches in the clear, or longer, located not over thirty inches above center line of coupler, or placed under the end sill as near the face as will insure a good, safe fastening, or, if preferred, may be placed on the face of end sill. The coupler unlocking rod, the tread of the ladder or any suitably located part of the car which does not exceed two inches on each side or in diameter, and has the proper clearance, will be considered a suitable end hand-hold."

An issue of fact was therefore sharply presented in the trial court as to whether or not the pin-lifter rod on the back of the tender described in evidence was a grab-iron or hand-hold within the meaning of the Act of Congress commonly known as the Safety Appliances Act. In behalf of the defendant in error the jury were instructed that in the event they should find among other things that "because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling

said tender (provided you so find)," defendant in error was run over and injured, they should find for the defendant in error.

Plaintiff in error requested, and the court refused to give an instruction to the effect that any iron rod or iron device securely fastened upon the end of the tender and to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars, was a grab-iron or hand-hold within the meaning of the law, and that if the pin-lifting rod extended across the rear end of the tender, and was so fastened and constructed that it could be conveniently grasped by employes in the performance of such work, then the plaintiff in error had not been guilty of negligence in failing to equip the tender with grab-irons in the manner provided by law. After refusing to give the instruction as requested by the plaintiff in error, the court of its own motion modified it by adding thereto the following words: "That said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars." To the giving of this modified instruction the railway company timely saved its exceptions. The issue was therefore sharply presented, as stated by the Supreme Court of Missouri in its opinion in the case, as to whether or not the Safety Appliances Act permitted the use, as grab-irons, of devices conveniently and securely located, which, however, served other purposes on the cars; also the issue as to whether or not if such dual use is permitted by the Act the appliance serving such dual purpose is required to afford *reasonable security under all circumstances to the employe using it.* The Supreme Court of Missouri not only held that it was not improper to tell the jury, as a matter of law, that such an appliance *must furnish reasonable security to the employes under all circumstances,* but held further that the Safety Appliances Act did not permit the use of the pin-lifter rod as a grab-iron. (Transcript 260-262.) It will thus be seen that question was argued before the court.

The constitution of the State of Missouri provides for two divisions of the supreme court of the state and further provides that under certain circumstances the judges of both divisions shall sit as court *en banc.* Section 4, of the Amend-

ment of 1890 to Article VI of said Constitution, provides as follows:

"Sec. 4. *Case transferred to court, en banc, when.* When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party shall be transferred to the court for its decision; or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

The appeal taken by plaintiff in error to the Supreme Court of Missouri was heard in Division No. 1, and all of the contentions of plaintiff in error were there ruled against it, including its contention that the cause should have been removed to the United States Circuit Court on its application therefor duly filed in the trial court, and the contention that error was committed against it in construing the provisions of the Safety Appliances Act, as mentioned above. After an unsuccessful motion for rehearing in said Division No. 1 of the Supreme Court of Missouri, plaintiff in error filed therein its motion to transfer the cause to the court, *en banc*, pursuant to the provisions of the constitution above quoted. The federal questions involved were specifically pointed out in the motion and the constitutional right to have the cause transferred was specifically set up therein. (Transcript 270-272.) On June 2, 1916, the court overruled the application to transfer the cause to the supreme court, *en banc*, and this writ of error was thereupon duly sued out.

ARGUMENT

I

Defendant in error makes the contention at the outset (Point I of his argument) that the writ of error should be dismissed because the verdict and judgment can be sustained on one of the three allegations of negligence contained in the first count of his petition, namely that the tender was equipped with a defective coupler which would not operate automatically by impact, that the defective coupler was a proximate cause of the accident, and that no complaint is made in the assignment of errors as to the manner in which this question was submitted to the jury. His contention is summarized as follows:

"It will thus be seen that upon this one ground of negligence; first, pleaded in Moore's petition; second, supported by the evidence; third, found by a jury, under an instruction requiring the finding of every essential fact necessary to a recovery; fourth, not attacked in any of the assignments of error presented by plaintiff in error herein to this court; and fifth, involving no disputed federal question upon which a writ of error to this court could properly be based, the writ of error herein should be dismissed, or the judgment of the Supreme Court of the State of Missouri, upholding the verdict, should be affirmed and this without any regard to any other questions raised by the assignments of error, to be hereafter discussed."

This glittering and seemingly specious generalization would be well enough if the plaintiff in error admitted, as is apparently assumed by counsel, that the coupler was defective and that it was a contributing cause of the accident and that the verdict of the jury was bottomed upon this particular allegation of negligence. Such assumptions, however, are without foundation in fact, for there is an overwhelming mass of testimony in the record to the effect that the coupler was in proper condition of repair and that it operated perfectly under all possible conditions; also equally persuasive is the testimony to the effect that the defendant in error either stumbled or was struck while attempting to walk down or across the track in front of the moving engine and tender which were backing up on his own signal, and that his act in going in front of the tender under such circumstances was the sole cause of the accident.

It was shown in evidence that the coupler in question was in the best possible condition of repair immediately before the accident; that no other member of the train crew had ever experienced or heard of the slightest difficulty in operating it; that it was inspected immediately after the accident by no less than a half dozen experts, and found to operate perfectly from every possible position by means of the unlocking or "pin-lifting" rod. Other witnesses testified that immediately before the accident defendant in error, after signaling the engine and tender to back up, stepped upon the stirrup-step on the side of the tender, rode a short distance, and then jumped to the ground, started down or across the track immediately in front of the moving tender and apparently stumbled and fell in front of it and was run over and injured before the engine could be stopped. According to all the evidence, Moore, just prior to the accident, was on the left, or fireman's side of the engine, and it was shown that it is customary for brakemen to work on the engineer's side of the engine whenever convenient, in order to transmit signals direct to him instead of indirectly through the fireman. It was also shown in evidence that sometime after the injury, Moore stated to the witness, M. A. Hartigan, Jr., that he stumbled and fell while going around the moving tender. The evidence of this witness on this point is as follows:

"Q. After Mr. Moore had been operated on, and was convalescing and able to sit up, or be up, did you visit him at the hospital, and if so, about how often? A. I think about twice. The first time two or three days after the accident, and the second time probably a couple of weeks. I cannot remember now.

Q. During the last visit that you have referred to, did you have any conversation with Mr. Moore as to how the accident had occurred? A. I had a conversation both times.

Q. I wish you would proceed and state, in your own language, what you said to him, and what he said to you, on the two occasions you have named, starting with the first—I mean with respect to how the accident occurred? A. I asked him how he happened to get caught in that way. He said that the engine had passed down over the switch; he had thrown the switch and signalled them to back up. He started across the track, around behind the engine, as it was backing up, and in some way he stumbled and fell; that he did not know exactly how he tripped or stumbled, but that he went down.

He further said that he did not think they would ever catch him.

Q. During the second visit that you made to Mr. Moore, which you say was some two weeks after the first, did you, at that time, have any conversation with him about how the accident had occurred? A. On both occasions, we talked about the accident.

Q. And on the second occasion that you were there, did he again state to you how it occurred? A. Yes sir; he stated again that the engine was backing up, and he walked around the head of the tender to get on the other side of the track, and stumbled and fell."

Another witness, Donan, an adjuster for the Continental Casualty Company, visited Moore about a month after his injury for the purpose of adjusting the liability of the insurance company under an accident policy issued to defendant in error. This witness testified (Transcript 198):

"A. After the preliminary, the introduction and so forth, I asked Moore the flat question as to how this accident occurred and he told me that he did not know, nor could he explain it to me—he stated that he was taking the engine on the siding and got hold of the corner of the tender, after which he did not remember anything else—could not tell me how it happened at all, did not know.

Q. Did he tell you whether or not the engine was running or stand-still? A. He told me he was taking the engine on the siding—going in on his signal—they were going in there after a car, he told me that, but as to how the accident happened he said he did not know."

Defendant in error testified that he had been out on the road with the engine and tender three or four days; that he had noticed that the knuckle on the tender could not be opened with the appliance provided for that purpose, and that it was necessary to use his hands in opening it; that he had notified the conductor of such defective condition and that the conductor had promised that it would have attention; that notwithstanding this knowledge, he attempted to open the knuckle with the pin lifter at the time of the accident and before he went behind the tender.

He further testified that after the accident he did not mention the fact that the coupler was defective to his friends, nor did he speak of that fact when he was asked by the wit-

ness, Donan, in the presence of defendant's superintendent, Hendrix, as to the cause of the accident, nor did he think of this significant fact when he made his affidavit for claim against the insurance company before the witness, Purvis. He admitted that he had never spoken of the alleged defective coupler to anyone, friend or foe, until he talked with his attorneys some months after the accident. Then it was for the first time he remembered that the coupler was defective and that he had been injured by reason thereof.

The foregoing is a fair summary of the evidence under the first count of the petition as to the alleged defective condition of the coupler, and upon this count of the petition the verdict was returned and judgment rendered. This count of the petition also charged the absence of grab-irons on the rear end of the tender and defendant in error's instruction No. 1, which covered his whole case so far as this count is concerned, and which directed a verdict in his favor, submitted *both* questions to the jury. Under the evidence as above outlined Moore's bare statement that the coupler was defective, unsupported as it is by any other fact or circumstance in evidence, and contradicted by all the other oral evidence as well as by the physical facts in evidence, is so unreasonable and improbable as to be wholly unworthy of belief, and it seems absurd to ask this court to say that under such circumstances the jury returned their verdict on the issue of the defective coupler rather than upon the issue of the lack of grab-irons.

In any event this court will not undertake to read the minds of the jurors and determine by what process of reasoning or upon which issue their verdict was returned.

Texas & Pacific R. Co. vs. Bourman, 212 U. S. 536, 53 L. Ed. 641.

Patton vs. Wells, 121 Fed. 337, 57 C. C. A. 551.

McMurray vs. St. L. I. M. & S. Ry. Co., 225 Mo. 272, l. c. 310.

York vs. Johnson, 116 Mass. 482.

LaMere vs. Ry. Transfer Co., 125 Minn. 159, 145 N. W. 1068.

It is as impossible to do so as, in the case of conflicting instructions, it is impossible to say by which instruction the jury were governed.

Railway Co. vs. Needham, 52 Fed. 371, 3 C. C. A. 129.
Railway Co. vs. Farr, 56 Fed. 994, 6 C. C. A. 211.
Armour & Co. vs. Russell, 144 Fed. 614.
Gardner vs. Metropolitan St. Ry. Co., 223 Mo. 389.

Defendant in error's first contention cannot be sustained upon any rule of law, nor upon any principle of logic.

II

We respectfully urge that, upon the record before this court, plaintiff in error's application to remove the cause to the Circuit Court of the United States should have been granted; that the state court was without jurisdiction to try the case, and that its judgment therein is void (First assignment of error).

It is true that this court in the case of K. C. S. Ry. Co. vs. Leslie, 238 U. S. 599, 59 L. Ed. 1478, and again in the case of Southern Railway Company vs. Lloyd, 239 U. S. 496, has said that under *both* the amendment of April 5, 1910, to the Employers' Liability Act, and the proviso contained in Section 28 of the Judicial Code, which became effective January 1, 1912, a cause brought under the Employers' Liability Act in a state court is not removable on any ground or for any reason. *But in neither of those cases was it necessary for this court to decide or declare the effect of the amendment of* 1910 *standing alone,* for both of those cases were instituted *after* January 1, 1912, and after Section 28 of the Judicial Code became effective. At least we feel justified in assuming that the Lloyd case was instituted subsequent to January 1, 1912, since while the date of filing does not appear in either the reported opinion of this court or in the reported proceedings in the state court, *it does appear that the cause was not tried until February,* 1913.

This court has so consistently followed the rule of deciding only so much as is necessary to dispose of the case before it that we feel justified in concluding that anything in the *Leslie* case and in the *Lloyd* case which appears to apply to

this case, which was instituted in February, 1911, nearly a year before Section 28 of the Judicial Code became effective, is *dictum* pure and simple.

Plaintiff in error contended in the state court and contends here that the Amendment of April 5, 1910, to the Employers' Liability Act did not prohibit removal on any ground mentioned in the Removal Act (now Section 28 of the Judicial Code), except the sole ground that the cause arose under the Federal Act. In other words, the amendment was no more than what it purported to be, an amendment to the Employers' Liability Act, and not an amendment to the judiciary act. It did not purport to *repeal* any existing law, nor to *amend* any existing law other than the Liability Act itself, nor does its title reveal any such purpose or intention.

In order to deny the right of removal in this case it is necessary to hold that the Amendment of April 5, 1910, *repealed* the Removal Section of the Judiciary Act *in toto* with respect to Employers' Liability cases, and such a rule of construction has never been approved by this court. On the contrary this court has always held that repeals by implication are looked upon with disfavor, and that, where it is possible to do so, full effect will be given to all provisions of laws contemporaneously in effect.

United States vs. Levois, 17 How. 85, 15 L. Ed. 54.
United States vs. Greathouse, 166 U. S. 601, 41 L. Ed. 1130.
United States vs. Healey, 160 U. S. 136, 40 L. Ed. 369.
Frost vs. Wenie, 157 U. S. 46, 39 L. Ed. 614.

This court has also held that in construing subsequent legislation affecting a subject already covered by a general code, the presumption will prevail that the general rules of the code are not suspended save as the contrary clearly appears.

United States vs. Barnes, 222 U. S. 513, 56 L. Ed. 291.

It is significant that when the Judicial Code was enacted effective January 1, 1912, congress deemed it necessary to place the proviso in Section 28 of that code, a wholly unnecessary action if the Amendment of April 5, 1910, to the Liability Act be given the sweeping effect contended for by defendant

in error. It is also significant that when congress decided to take away the right of removal of causes arising under the Carmack Amendment to the Act to Regulate Commerce, *it was Section 28 of the Judicial Code that was amended* and not the Act to Regulate Commerce.

The only ground for removal *necessarily* taken away by the Amendment of April 5, 1910, is that arising from the fact that a Liability Case is founded upon a Federal Statute. We respectfully urge that this court has never had a case before it in which it *could* decide this identical question, and furthermore, that if it was the intention of this court that the *Leslie* case and the *Lloyd* case should decide it, we are justified in urging a reconsideration *in a case where the question is an issue*, and where the decision will be something more than *dictum*.

III

The third, fourth and fifth assignments of errors involve the second issue submitted to the jury on the first count of the petition, namely, the alleged lack of grab-irons on the rear end of the tender. Each of these assignments presents a live and vital question as to the proper construction of so much of the Safety Appliances Act as pertains to the question of "grab-irons or hand-holds in the ends of cars for the greater security to men in coupling and uncoupling cars," and fundamentally involves the determination of the question as to whether under that Act, a grab-iron may serve a dual purpose—whether it may be a grab-iron and still serve another purpose as part of another appliance. That is a question which this court has never determined, or even considered, so far as we are aware, and it is certainly sufficient to support the jurisdiction of this court in the instant case.

This question is not trivial, but vital. It involves the legality of a practice followed by all the railroads of the country for years, having the sanction of experts in car building. It is shown by the evidence in this case that if such a practice were unlawful practically every railroad in the country was violating the law in probably hundreds of instances daily at the time this accident happened. This court will take notice of the fact that it was not until March 13, 1911, that the Inter-

state Commerce Commission *for the first time* designated the *number, dimensions* and *location* of hand-holds, pursuant to the Act of Congress of April 14, 1910, *and that even in that order the commission permitted the substitution of the tread of an end ladder for an end hand-hold.*

(a) The third assignment of errors complains of the action of the trial court in giving to the jury Moore's instruction No. 1, and particularly that part of said instruction which told the jury that if they should find from the evidence that "because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), plaintiff was run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition."

The instruction was erroneous for the reason that it assumed and told the jury in so many words that the pin-lifter rod, the iron ladder and other appliances on the end of the tender were not grab-irons or hand-holds within the meaning of the law. This was the vital issue in the case so far as the hand-hold question was concerned.

The question to be determined by the jury was whether or not the tender was equipped with grab-irons or hand-holds securely fastened, and it was not proper for the court to assume that it was not so equipped and then leave the jury to speculate as to whether or not it was equipped with a suitable substitute, "*affording the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender.*"

The issue to be submitted to the jury was the presence or absence of grab-irons or hand-holds for the greater security of employes, etc. The defendant contended that there were hand-holds on the tender, within the meaning of the law, and

that no particular type of iron was necessary, nor was it necessary that they serve the single purpose of grab-irons or hand-holds. The Federal Courts, in construing the law, have so held:

Spokane & I. E. R. Co. vs. United States, 210 Fed. 243.
U. S. vs. Boston & M. R. Co., 168 Fed. 148.

(b) The fourth assignment alleges error in the action of the trial court in refusing instruction No. 3 as requested, and in modifying it by inserting the words printed in italics, and in giving said instruction as so modified on its own motion, and over the objection and exception of the plaintiff in error. This action had the approval of the Supreme Court of Missouri, which held in its opinion: "The instruction was error in appellant's favor." (Transcript 261.)

The instruction as given, after modification by adding the words in italics, is as follows:

NUMBER THREE

The court instructs you that at the time plaintiff was injured, the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employes in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employes while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employes, while in the performance of their duties, in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance

of such work, *and that said attachments or devices furnished reasonable security to the employes of defendant in coupling and uncoupling said tender and cars,* then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employes, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender.

Under this instruction it was the duty of the defendant to have the rear end of its tender equipped with attachments or devices which would make the coupling or uncoupling of the tender *reasonably safe under all circumstances.* The law imposed no such obligation upon the defendant. Section 4 of the Safety Appliances Act is as follows:

"That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Under the provisions of this Act all the defendant was required to do was to place hand-holds or grab-irons upon the end of its tender for "greater security to men in coupling and uncoupling cars," and when it had performed this duty it had complied with the law, whether danger had been eliminated or otherwise. Well may the jury have thought and found that the appliances used by the defendant did not furnish *reasonable security* to employes, though they may at the same time have thought that such appliances *were in all respects as safe as those which plaintiff claimed should have been upon the tender.* To state that the law required the defendant to equip its tender with grab-irons or hand-holds which would at all times *furnish reasonable security to employes, is to state an absurdity,* and to permit the jury to determine whether the appliances furnished by the defendant provided reasonable security to such employes was likewise a vicious violation of the defendant's rights. The Act of Congress imposed no such burden upon the defendant.

(c) It follows from what has been said under "a" and "b" *supra*, that the fifth assignment of error must be sustained. Said assignment is as follows:

"Said Supreme Court erred in holding in its approval of the above instruction that the Federal Safety Appliances Act 'does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission.' And in holding that the Act requires grab-irons or hand-holds (technically so called) in addition to other appliances which might be conveniently and securely located, and which might serve every purpose of a hand-hold or grab-iron, although at the same time serving some other purpose."

The Supreme Court of Missouri said in its opinion (Transcript 261-2):

"It (The Safety Appliances Act) does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance, so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission. The same act provided for automatic couplers which could be coupled and uncoupled 'without the necessity of men going between the ends of the cars' and separately provided that 'grab-irons or hand-holds' should be placed in the sides and ends of cars used in interstate commerce.

It is clear congress intended to and did require both the automatic coupler, which included its uncoupling lever or pin-lifting rod, and, in addition, required grab-irons, or hand-holds to be placed in the ends and sides of cars. The instruction, therefore, was erroneously favorable to appellant in permitting the jury to exonerate it if it had failed to place grab-irons on its tender but had offered a substitute in the form of a pin-lifting or uncoupling rod. That the act did not contemplate such a substitution is clear from its terms. It has been so held by one federal court. United States vs. Railway, 184 Fed. 94; United States vs. Railway, 184 Fed. 99. Either automatic couplers, with their uncoupling levers, were in use and upon cars when the applicable Safety Appliance Act was passed or they were not. If they were not in use, it is impossible that congress had them in mind in requiring grab-irons in the end of cars. If they were in use, then the act clearly contemplated grab-irons in addition to them in order to afford employes 'greater security' than was then afforded by whatever appliances were upon the cars. It is true there are decisions which construe the act otherwise, but the cases cited are in better accord with its language and the circumstances attending its passage."

The "decisions which construe the Act otherwise" as conceded by the court are:

Spokane & I. E. R. Co. vs. U. S., 210 Fed. 243.

U. S. vs. Boston & M. R. Co., 168 Fed. 148.

The case of Spokane & I. E. R. Co. vs. U. S., 210 Fed. 243, was before this court on writ of error (Spokane & I. E. R. Co. vs. U. S., 241 U. S. 344), and while the precise question in the instant case was not discussed, this court did, in effect, hold that in such cases the question to be decided by the jury is: does the appliance which is offered as a substitute for what is *technically* called a "grab-iron," in fact amount to a grab-iron within the meaning of the law? His Honor, the Chief Justice, who wrote the opinion, said in that case:

"It is contended that error was committed in rejecting the testimony of experts offered by the railroad company as to the protection afforded to employes by the openings in the buffers at the ends of the twelve cars. Without stopping to point out the inappositeness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts, and that the jury, after hearing the testimony and inspecting the openings, were competent to determine the issue, particularly in view of the full and clear instruction given on the subject, concerning which no complaint is made."

The "full and clear instruction" referred to by the Chief Justice in the opinion last quoted fully supports the instant contention of plaintiff in error. It is as follows:

"If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known *technically* as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be afforded by having what would be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant. The law does not require any particular kind of grab-iron or hand-hold to be placed upon the end of the car, but only requires that some such appliance be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given. Gentlemen, you have heard the testimony in this case, and you have examined the hand-holds in question, and it is for you to say from that testimony and from

your personal examination of the cars whether the appliance provided by this company complies with the act of congress."

IV

The seventh assignment of error complains of the overruling of a demurrer to the evidence, and raises a federal question which cannot be held frivolous on motion to dismiss.

Seaboard Air Line vs. Padgett, 236 U. S. 668, 59 L. Ed. 777.

V

The eighth and ninth assignments of errors complain of the action of the Supreme Court of Missouri in denying the application of plaintiff in error to transfer this cause from Division No. 1 of said court to the court *en banc*, as provided in Section 4 of the Amendment of 1890 to Article VI of the Constitution of Missouri. This motion was first filed March 30, 1916, *before* the motion for rehearing in division was determined (Transcript 263), and renewed in a somewhat more elaborate form in a second motion to transfer filed April 5, 1916 (Transcript 270), six days after the motion for rehearing and the first motion to transfer were overruled on March 30, 1916. Both the first and the second motions to transfer to the court *en banc*, were overruled without opinion or discussion, and the action of the Supreme Court of Missouri is, therefore, nothing more than a denial of the right asserted by plaintiff in error in such motions, and did not, in any sense, "construe" the provision of the State Constitution, nor did it determine "that the losing party had waived any right he had under this provision of the Constitution by submitting the cause to a division of the court for determination" as contended by defendant in error in his argument under his Point IX. Furthermore, even if that court had construed the constitutional provisions to have the meaning argued by counsel, this court will place its independent construction thereon for the purpose of determining whether or not a right guaranteed by the Federal Constitution has been denied by the decision of the Supreme Court of Missouri.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220.
A. T. & S. F. Ry. Co. vs. Matthews 174 U. S. 96, 100, 43 L. Ed. 909, 911.

The decisions of this court foreclose the possible contention that the protection of the Fourteenth Amendment does not extend to the action of the judicial department of the state as well as to any other manifestation of the authority of the state.

Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.
Yick Wo vs. Hopkins, *supra.*
Scott vs. McNeal, 154 U. S. 34, 38 L. Ed. 896.
C. B. & Q. Rld. Co. vs. Chicago, 166 U. S. 226, 41 L. Ed. 979.

The ninth assignment specifically asserts that the action of the Supreme Court of Missouri in overruling said motions to transfer denied it the due process of law and the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. This court entertained jurisdiction and *decided on the merits* the case of Moore vs. State of Missouri, 159 U. S. 673, 40 L. Ed. 301, where the identical question was urged, and where the motion to transfer to the court, *en banc,* was filed *after the division had decided the case.* In that case this court refused to disturb the judgment on the sole ground that the *record did not clearly show that a federal question was involved in the case decided by the Supreme Court of Missouri in division.* Federal questions were *necessarily* involved in the instant case from the outset.

Toledo, St. L. & W. R. Co. vs. Slavin, 236 U. S. 454, 59 L. Ed. 671.

We respectfully urge that the ninth assignment of error alone raises a question sustaining the jurisdiction of this court.

Moore vs. State of Missouri, *supra.*

VI

In conclusion we respectfully submit that the motion of defendant in error should be denied in all its aspects. So much of the motion as asks for affirmance of the judgment, or dismissal of the writ of error, is wholly without merit, since it cannot be said to be "patently obvious" that the decision of the Supreme Court of Missouri is correct as to a single point

urged as error in the several assignments. The motion to affirm or dismiss must be denied.

Mo. Pac. Ry. Co. vs. Larabee, 234 U. S. 459, 58 L. Ed. 1398.

Furthermore the nature of the errors which we have pointed out in this argument are of such serious nature as to merit the deliberate consideration of this court upon full and careful presentation and argument, and we respectfully insist that the cause be not transferred to the Summary Docket, and that the motion of defendant in error be denied in its entirety.

ROBERT A. BROWN,

Attorney for Plaintiff In Error



INDEX

Page

Argument 48
Assignments of Errors 41
Instructions:
Plaintiff's First 11
Defendant's Second 13
Defendant's Third 13
Motion to Dismiss 1, 2
Motion for Re-hearing 30
Motion to Transfer to Court en banc (first) 36
Motion to Transfer to Court en banc (second) 38
Notice of Motion 3
Opinion, Missouri Supreme Court 15
Petition 5
Statement 4

AUTHORITIES CITED

Bi-Metallic Inv. Co. v. State Board of Equalization, U. S. Adv. Ops. 1915, p. 141 70
Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 S. C. R. 865, 59 L. Ed., 1433 56
Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 36 S. C. R. 399 56
Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 34 S. C. R. 581, 58 L. Ed. 838 67
Kansas City So. Ry. Co. v. Leslie, 238 U. S. 599, 59 L. Ed. 1478 52
Price v. People of Illinois, 238 U. S. 445, 59 L. Ed. 1400 70
Republic Oil Co. v. State of Missouri ex rel., 224 U. S., 271, 56 L. Ed. 760 71
Seaboard Air Line Ry. Co. v. Padgett, 236 U. S. 668, 35 S. C. R. 481, 59 L. Ed. 777 55
Welch v. Swazey, 214 U. S. 91, 53 L. Ed. 923 71
Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, 53 L. Ed. 417 71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 573

ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY,

Plaintiff in Error,

vs.

RALPH W. MOORE,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI

Motion to Dismiss Writ of Error or Affirm Judgment or Transfer to the Summary Docket; with Statement and Argument of Defendant in Error in Support Thereof.

Now comes the defendant in error, Ralph W. Moore, by his attorney of record herein, and moves this Honorable Court:

First: To dismiss the writ of error herein on the ground that this Court has not jurisdiction thereof, no controlling Federal question being involved therein; or

Second: To affirm the judgment of the Supreme Court of the State of Missouri on the ground that it is manifest that the writ of error was taken for delay only and that the questions upon which the decision in this case depend are so frivolous as not to need further argument; or

Third: To transfer this case for hearing to the summary docket, if this Court should decline to dismiss or to affirm, because the case is of such a character as not to justify extended argument.

JOHN G. PARKINSON.
of St. Joseph, Missouri,
Attorney of Record for Defendant in Error.

NOTICE OF MOTION

The plaintiff in error is hereby notified that the defendant in error will, on the 11th day of December, A. D. 1916, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said Court, the foregoing motions and each of them and the statement, brief and argument in support thereof, hereto attached; all of which are now served upon you herewith.

JOHN G. PARKINSON.
of St. Joseph, Missouri.
Attorney of Record for Defendant in Error.

Copy of the foregoing motion and notice, together with the statement of facts, points and authorities, statement and argument received this 18th day of November, 1916.

ROBERT A. BROWN,
of St. Joseph, Missouri.
Attorney of Record for Plaintiff in Error.

STATEMENT

This cause was instituted in the Circuit Court of Buchanan County, Missouri on the 3d day of February, 1911, returnable to the May, 1911 term of said Court, to recover damages under the Federal Employers' Liability Act for an injury to defendant in error, Moore, sustained in the town of Marysville, Kansas, on the 9th day of June, 1910, through the negligence of the plaintiff in error, railway company. It was admitted by the parties hereto that at the time of the injury to Moore the railroad company was a common carrier by railroad engaged in interstate commerce between several states and that Moore was injured while in the employ of the railroad company and while he was working in interstate commerce.

Within the time required by law and on the 1st day of May, 1911, the railroad company filed its petition and bond for removal of the cause to the United States Court for the proper district, upon the ground that the plaintiff's cause of action as shown by his petition was "based upon and in pursuance of a statute and law of the United States, and particularly in pursuance of the Act of Congress of April 22d, 1908, and acts pursuant thereto and amendatory thereof, for the determination of the liability of common carriers by railroad to their employees for such injuries received by such employees while in the service of such common carriers."

Thereafter the petition for removal was overruled by the State Court, and during the October,

1911, term of said Court the case was tried upon an amended petition in two counts, resulting in a judgment in favor of Moore and against the railroad company on the first count of the petition, which was in words and figures as follows: (Caption omitted).

"Plaintiff for his second amended petition and cause of action states that at all the times herein mentioned the defendant was and now is a corporation duly organized and operating a line of railroad as a common carrier in, to and through the States of Missouri, Kansas and Nebraska, and other states, and in, to and through the towns of Hanover, Marysville and Hiawatha, towns in the State of Kansas and St. Joseph, a city in the State of Missouri; that at all the times herein mentioned the defendant was and now is engaged as a common carrier by railroad in interstate commerce between the several states of Missouri, Kansas and Nebraska, and other states.

"Plaintiff further states that on the 9th day of June, 1910, the defendant owned and operated and hauled and permitted to be hauled as part of its train running in interstate commerce and as a part of the train upon which plaintiff was employed, a freight engine and tender attached thereto, number 45, and negligently, wrongfully and unlawfully hauled and permitted to be hauled and used on its said line of railway, said tender attached to said engine then and there used in moving in interstate traffic without providing said tender with secure grab-irons or hand-holds in the end of said tender for the security to men in coupling and uncoupling cars, and negligently and wrongfully and unlawfully hauled and permitted to be hauled and used on its said line of railway, said tender attached to said engine then and there used in moving interstate traffic with a coupler thereon designed to couple automatically by impact and to be uncoupled without

the necessity of men going between the end of said tender and the ends of other cars in a defective and dangerous condition in this:

"That on the 9th day of June, 1910, and for a long time prior thereto said coupler and its parts and attachments thereto would not work or accomplish the purpose for which it was designed and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the ends of the cars; that at all the times on said date and for a long time prior thereto it was necessary for men and this plaintiff, working in, upon and about said tender to go between the end of said tender and the cars to which it might be desired to couple the same and work by hand the coupler and its parts into a position so that the same would couple to the car to which it might be desired to attach the same; that said car was not equipped at said time with a coupler coupling automatically by impact and which would be uncoupled without the necessity of men going between said tender and the ends of cars.

"Plaintiff further states that on the 9th day of June, 1910, while in the performance of his duties and in the exercise of care and caution he was working upon, about and near said engine and tender and upon said defendant's track at a point about six hundred feet north of the north line of the depot platform of the defendant company in the town of Marysville, Kansas, and while so doing it was necessary for him to go between the tender and the end of the cars for the purpose of working by hand said coupler so that the same could and would be made to couple with the car to which it was desired to attach the same; that he was compelled to go upon said track at said point and between the tender and the car to which it was to be coupled on account of the defective condition of said

coupler, and while so engaged the defendant company and its agents and servants in charge of said engine and tender so equipped with said coupler in said defective condition, and controlling its movements, carelessly and negligently while engaged in interstate commerce backed said engine and tender with steam hose attachment negligently maintained on the rear thereof against, upon and over the plaintiff without any signal from plaintiff; that the plaintiff was on account of the negligent, wrongful and unlawful act of the defendant in hauling and permitting to be hauled and used upon its line said tender without the same being provided with secure grab-irons or any hand-holds in the end of said tender for the greater security to defendant's employees, and this plaintiff in coupling and uncoupling cars, and on account of the negligent, wrongful and unlawful act of the defendant in hauling and permitting to be hauled and used upon its line said tender equipped with a coupler and its parts and attachments in the defective condition as aforesaid; and on account of the carelessness and negligence of the defendant and its agents and servants controlling the movements of said engine and tender in carelessly and negligently causing said engine and tender to be backed without any signal from the plaintiff, with a steam hose attachment negligently maintained on the rear thereof, caught and thrown upon the track and run against, upon and over, thereby crushing and tearing from his body both hands and arms, and breaking, crushing and mangling the bones of plaintiff's left leg and thigh, and crushing, tearing and cutting the muscles, arteries, veins, nerves and ligaments of plaintiff's left leg, and crushing, bruising and lacerating the muscles, nerves, veins, arteries and ligaments of plaintiff's arms and head.

"That on account of the above and foregoing the plaintiff has and will in the future suffer great bodily

pain and mental anguish; that he has been unable to do any work of any kind since the receipt of said injuries and will in the future be unable to perform work of any kind or character; that his ability to earn a livelihood has been permanently impaired and decreased; that he is unable to feed or dress himself or care for his person and has and will in the future be compelled to spend large sums of money for the care of himself in feeding, dressing and caring for himself, that he has been compelled to spend large sums of money and contract large indebtedness for medicines and medical attention, and will in the future be compelled to spend large sums of money for medicines and medical attention.

"That on account of the above and foregoing he has been damaged in the sum of one hundred thousand dollars ($100,000.00) for which, together with his costs in this behalf expended, he prays judgment."

Upon the trial of the case Moore introduced evidence sustaining each and every allegation of his petition. The following evidence by Mr. Moore (Transcript of Record, page 19 et seq.) explains the rear of the tender of the engine with reference to the condition of the automatic coupler and the absence of grab irons or hand holts:

> Q. Tell the jury whether or not there were any hand-holds or grab-irons on the rear of the tender that you were working with that day?
>
> A. There were no hand-holds or no grab-irons on the rear of the tank that I was working with that day.
>
> Q. There were none at all?
>
> A. There were none at all.
>
> Q. Mr. Moore, state whether or not this engine was equipped with any coupler, automatic

coupler designed to couple by impact with cars, and be uncoupled without the necessity of men going between them?

A. It was not.

Q. I say did it have on a coupler that had that purpose?

A. There was a coupler there for that purpose, but it would not work.

Q. How long had that coupler been out of condition?

A. It had been out of condition for two or three days.

Q. Had you notified anybody about its condition?

A. I had told the conductor a day or so before that the coupler was not working, or in working order, and he says, "Well, we will have it fixed."

Q. What are the parts of that automatic coupler, so the jury will understand, what does it consist of?

A. It consists of a knuckle, fastened to the end of the draw bar, and a chain, a pin-lifter, which is a part of the automatic coupler, a knuckle on the inside, so that when you raise the lever it throws the knuckle open; a pin-lifter, a chain, a knuckle and a dog, that is an automatic coupler.

Q. Where does this pin-lifting rod run on the back of the tender, please?

A. It runs along, just on top of the draught timber of the tank. There is a handle on each end, sets just inside on the outside end of the draught timber where you have to reach in to get a hold of it.

Q. On this particular engine what was the trouble with this automatic coupler?

A. A part of this automatic coupler, the pinlifting rod, which was a part of the automatic coupler, was sagged down in the center, and bent in towards the tank that when you raised it up, it made the chain longer, and sagging in the middle so it would throw the knuckle open.

Q. That is, you mean the pin-lifting rod was bent downwards and towards the tank in the center?

A. That is what I say. That is what I mean.

Q. How much did it sag down, would you say, would you estimate?

A. Well, I would estimate it now about nearly an inch and a half.

Q. Would the lifting of the rod open that knuckle?

A. It would not.

Q. How close was that—how was that pin-lifting rod as you stand along the back end of the tender?

A. It was so close that a man with gloves on working could not grab his hand and grab ahold of it down on it. You could not get your hand down in it to grab it.

Q. What supported it? How was it supported along the rear of the tender?

A. It was supported with four—what you might call strap irons, fastened into the wood, with a little round loop on top, and the rod runs through it.

Q. Now state whether or not that was out three or four inches from the tender so that you could grab ahold of it with your hands?

A. It was not.

Q. Are you positive about that?

A. I am positive of it.

Q. State whether or not this coupler could be worked from the outside, or side of the tender.
A. It could not."

There was evidence to the effect that there were vertical hand-holds on the sides or rounded corners of the tender, and a ladder extending vertically up the rear of the tender, the lower end being fastened above the buffer beam and the pin-lifting rod, the lowest lateral round of which was something more than two feet above the coupler, also stirrups extending beneath the body of the tender on the sides thereof and near the rear end of the same.

At the request of the plaintiff the Court gave, among others, instruction No. 1, as follows:

> "The Court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common carrier engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler designed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of the cars, and you find from the evi-

dence that said tender was not provided with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand-hold on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in the performance of his duties working in interstate commerce for defendant in coupling said tender to cars and was between the end of said tender and cars, and while in the exercise of ordinary care was, by reason of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars (provided you so find), and because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find) and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoup-

ling said tender (provided you so find) run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition."

At the request of the defendant, the Court gave, among others, Defendant's Instruction No. 2, as follows:

"If you believe and find from the evidence that the coupler attached to the rear end of the defendant's tender was not defective, that it worked automatically and that it could have been operated by plaintiff from the side or corner of the tender and without the necessity of his going upon or between defendant's railway tracks, or taking hold of said coupler with his hands to operate the same, then he cannot have a verdict under the first count of his petition, and as to that count of the petition your verdict will be in favor of defendant."

The defendant further asked the Court to give Defendant's Instruction No. 3. This instruction was objected to by Moore and the Court modified it and gave it as modified over the objection of both parties. With the clause added by the Court placed in parentheses for the purpose of identification, the instruction as given is:

"The Court instructs you that at the time plaintiff was injured, the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should

be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employees in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employees while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employees, while in the performance of their duties, in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance of such work (and that said attachments or devices furnished reasonable security to the employees of defendant in coupling and uncoupling said tender and cars) then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employees, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender."

A verdict was returned in favor of Moore upon the first count of his petition for the sum of Twenty-Five Thousand Dollars.

Upon appeal to the Supreme Court of Missouri the judgment was in all things affirmed by Division One of that Court, in an opinion by Judge Blair, as follows: (Caption omitted).

> "Moore, the respondent, instituted this action in the Buchanan circuit court under the Federal Employers' Liability Act (35 U. S. Stat. at Large, Chap. 149, p. 65; Fish v. Railroad, 263 Mo. l. c. 115, 116) for damages for personal injuries, and recovered judgment for $25,000.00 under a count of the petition alleging, among other things, that respondent's injuries were due to appellant's violation of those provisions of the Safety Appliance Acts requiring the attachment of grab-irons or hand-holds and the maintenance of automatic couplers in operative condition upon the rear of engine tenders, and to the fact that an engine and tender operated in a condition violative of the provision mentioned was negligently backed against and over him.
>
> "The facts bringing the case wthin the purview of the Federal Act are undisputed. Respondent offered testimony tending to prove the allegations of the petition, and the evidence by defendant tended to disprove those allegations and to prove contributory negligence, which appellant pleaded. Numerous assignments are relied upon for reversal. Further facts are stated in the course of the opinion.
>
> "I. The ruling denying the petition for removal to the Federal Court on the ground of

diversity of citizenship was correct. K. C. So. Ry. v. Leslie, 236 U. S. l. c. 602, 603; Fish v. Ry, supra, l. c. 116.

"II. It is insisted the judgment cannot stand because, it is argued, the verdict is against the great weight of all the credible evidence in the case. The general rule on appeals in actions at law is that if there is substantial evidence tending to support the verdict the jury's view of the weight of the evidence is accepted by this court. A careful examination of the entire record satisfies us this assignment is an effort to overthrow a verdict on the ground it is against the weight of the evidence. Respondent's evidence clearly tended to prove the negligence alleged. It is not contended it did not do so except on the theory that it was so contradicted by appellant's evidence that its probative force was destroyed. In fact, however, some of the witnesses whose testimony is relied on as destroying respondent's evidence contradicted themselves. Some were contradicted by others of appellant's witnesses, and some contradicted physical facts tending to make out respondent's case and shown beyond dispute by photographs offered by appellant. In these circumstances the usual rule applicable in cases tried on conflicting evidence unquestionably applies, and the point is ruled against appellant.

"The decisions cited to the contrary do not deal with cases such as this, wherein is presented but another example of conflicting evidence, with substantial evidence supporting the verdict. In those cases is found something inherently improbable in the evidence held unsufficient.

"III. Appellant introduced in evidence a rule which, among other things, forbade em-

ployees 'to go between cars in motion to uncouple them' or to engage in other dangerous practices.

"On the trial appellant contended respondent, in violation of this rule went behind the tender while it was in motion in response to his own signal and that his doing so was the proximate cause of his injury. Respondent's counsel while cross-examining one of appellant's expert witnesses asked him whether it was not customary for employees to go between cars 'to fix the knuckles' of couplers in case the pin-lifting rod would not work. The witness answered in the affirmative, and the admission of this testimony is asserted to be erroneous because it appeared the witness knew nothing of any violation of appellant's rule by its employees but answered from a general knowledge of railroads, not including appellant's.

"The context shows the witness had already testified that when a pin-lifting rod was so constructed that it could be readily grasped by employes, no additional security was afforded by placing upon tenders and cars appliances designed to serve only as grab-irons and without any other function. It was while respondent's counsel was endeavoring to probe the grounds of this testimony that the question objected to was asked. The context discloses its purpose was simply to show that despite the equipment of cars and tenders with automatic couplers, occasions arose when it was necessary to go between the cars and to use the hands 'to fix the knuckle.' No mention of going between moving cars is made in the question or answer and, consequently, the force of appellant's rule could not be affected. Further, respondent's violation, if

any, of appellant's rule was at most but evidence of contributory negligence; and in this case, the action being founded upon violations of the applicable Safety Appliance Act, contributory negligence constitutes neither defense nor mitigation. Second Employers' Liability Cases. 223 U. S. l. c. 49, 50. There was no error in this ruling.

"IV. Over appellant's objection the trial court admitted in evidence respondent's 'Exhibit G,' a photograph of the rear of tender attached to one of appellant's engines of the class to which belonged the engine and tender by which respondent was injured. Witnesses had testified that the grab-irons shown upon the buffer-beam or end sill of the tender in the photograph were of the character and in the position in which it was the custom of railroads to place grab-irons upon tenders at the time and prior to respondent's injury in June, 1910. The photograph was by these witnesses declared to depict a correct placing of the grab-irons according to the then prevalent custom. In admitting the photograph, the trial court specifically stated it was admitted 'for the purpose of explaining the testimony of certain witnesses, who said that prior to June, 1910, and at that time, engines had grab-irons on them attached to the end sill, and that when so attached they were located as shown and marked in ' "Exhibit G".' In handing the exhibit to the jury, immediately thereafter counsel for respondent said: 'Gentlemen, the court has admitted this photograph in evidence to illustrate and show to you gentlemen the location of hand-holds or grab-irons.' On objection being made 'to counsel making a statement to the jury,' the trial court said to the jury: 'Gentlemen, this picture is admitted in evidence, not to show or tend to show

negligence on the part of defendant or that it was under a duty to locate grab-irons as indicated in the picture at the time this accident occurred, or to show whether that was so or not, but to explain to you the testimony of certain witnesses, who referred to this picture and a lead pencil mark 'X' on one of the grab-irons, and testified as to the location of grab-irons on the end sill of tenders, when grab-irons were put on the end sill of tenders, to illustrate the location they said was customary when grab-irons were so located.'

"The exhibit was clearly admissible for the purpose the court stated. Counsel does not contend to the contrary. Being admissible for one purpose, the fact that it might not be admissible for others is not available as a means for its exclusion. In such circumstances instructions may be employed to limit the effect of the evidence offered. Union Savings Ass'n v. Edwards, 47 Mo. l. c. 449; Wilkins v. Ry., 101 Mo. l. c. 106.

"V. Appellant insists the first instruction given for plaintiff is erroneous. That instruction was designed to present the law upon the issues under the first count of the petition, which was grounded upon non-compliance with the Safety Appliance Act relating to grab-irons and couplers. The instruction reads:

" 'The court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common carrier, engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler de-

signed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, and you find from the evidence that said tender was not provided with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand-hold on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in the performance of his duties working in interstate commerce for defendant in coupling said tender to cars was between the end of said tender and cars, and while in the exercise of ordinary care was, by reason of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars (provided you so find) and because of the failure of the defendant company to provide said tender with secure grab-irons or

hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find) and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find) run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition.'

"It is insisted that neither pleadings nor evidence warranted this instruction; that it assumes facts in controversy and is in conflict with instruction three given for appellant.

"(1) The first count of the petition alleges, in substance, and the evidence tends to show, among other things, that appellant negligently and unlawfully had in use an engine with a tender upon the end of which there were no secure grab-irons for the greater security of employees in coupling and uncoupling cars and upon which the automatic coupler was so out of repair that it could not be operated except by an employee going between the tender and cars; that respondent in the performance of his duties in coupling went behind the tender, and appellant's servants negligently backed the engine against, upon and over him, and that by reason of these negligent acts respondent was injured.

"Appellant's chief contention in this connection is that since the instruction did not require the jury to find that the engine was negli-

gently backed against respondent it ignores one allegation of negligence and is erroneous for that reason. It is not perceived in what manner appellant could have been injured by the elimination from the instruction of one of the grounds authorizing, if proved, a recovery. It is indisputable that plaintiff was entitled to recover if the tender was not equipped with grab-irons and an operative automatic coupler in the manner required by the Safety Appliance Act and if the absence of these or either of them contributed to his injury, and this without regard to any question of contributory negligence. Grand Trunk Ry. v. Lindsay, 233 U. S. 48, 49. That he might also be entitled to rely upon negligence in backing the engine without signal could not defeat his right to rely upon concurrent and negligent non-compliance with the Safety Appliance Act, such non-compliance accounting for his presence in the course of duty behind the tender and largely diminishing the probabilities of his saving himself from injury as the tender moved against him, if respondent's evidence is to be believed. The jury evidently believed it.

"(2) It is also contended the instruction assumes that the pin-lifting rod or uncoupling rod upon the rear of the tender was not a grab-iron within the meaning of the act requiring grab-irons. There is no doubt that an instruction assuming as true a material fact in controversy is erroneous. It is manifest, however, from reading the instruction that it contains no such assumption as charged, and neither analysis nor discussion is necessary to disclose the fact.

"(3) An objection founded upon the asserted conflict between this instruction and instruction three given for appellant is based upon

the contention that this instruction contains the erroneous assumption just adverted to. This objection falls with the previous one.

"VI. One William Temps was a witness for appellant at the trial and had previously given his deposition. While on the stand he was cross-examined as to certain answers he made when his depostion was taken. The questions and answers read to the jury were not the identical ones concerning which he was cross-examined, and on this a claim of error is predicated.

"The contention cannot be sustained because (1) there is not a fact of the slightest consequence mentioned in the questions and answers read which is not included in the questions and answers in the deposition which the cross-examiner called to the witness' attention and the witnesses admitted were asked and answered as shown by the deposition; and (2) the testimony of the witness on the stand was in entire harmony with the questions and answers read. Appellant, in this connection, as appears from the cases cited in the brief, relies upon the rule that it is error to permit counsel to go outside of the record and present to the jury extraneous matter of prejudicial character. The rule is inapplicable. As stated by appellant's counsel in his objection, the design of reading this matter from Temps' deposition was not to contradict him, since he had admitted testifying as disclosed by those parts of the depostion concerning which he was asked. The only rational purpose was to put before the jury exactly what Temps did say. The reading of these few questions concerning which Temps had not been specifically questioned was obviously due to respondent's counsel's honest but mistaken belief that Temps had been questioned

concerning them. Had they differed in any material way from his testimony on the trial, another question would have been presented. They did not differ from it and no possible injury could have come to appellant from the mere fact that counsel read to the jury testimony which was in every possible material respect in the record before them out of the mouth of the witness counsel quoted.

"VII. The rule is that when a jury returns a verdict upon one count of a petition this is equivalent to a finding against plaintiff on other counts concurrently submitted. From this rule appellant argues the verdict is inconsistent in that the jury made no finding upon the second count, thereby impliedly finding against plaintiff on that count, and thereby finding against the truth of the facts in the second count, many of which were the same as those alleged in the count upon which the verdict was returned. It is argued that it results the two findings are in conflict and the verdict cannot stand. No case is cited which supports this contention. The cases cited announce the stated rule as to findings implied from silence in the verdict upon a single count when the case is submitted under several counts differently stating the same cause of action. The proposition advanced refutes itself. Such a rule as that contended for is contrary to the precedents and practice and would preclude the employment of more than one count for the purpose of stating a cause of action in different ways to meet the exigencies of proof and would, in fact, for all practical purposes, partially repeal our statute which permits the joinder of causes of action, and, as construed, permits

one count to refer to another for facts common to both.

"VIII. Among the instructions requested by appellant was instruction three, referred to above. This instruction the court modified and gave over the exceptions of both parties. With the clause added by the court placed in parentheses for purposes of identification, the instruction as given reads as follows:

" 'The court instructs you that at the time plaintiff was injured, the law did not prescribe any fixed or definite character of hand-holds or grab-irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the end of its tender secure hand-holds or grab-irons for the greater security of its employees in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling and uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron, securely fastened and so located as to be within easy reach of defendant's employees while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employees, while in the performance of their duties, in coupling and uncoupling cars, to readily grab

hold of the same for their better security while in the performance of such work (and that said attachments or devices furnished reasonable security to the employee of defendant in coupling and uncoupling said tender and cars), then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employees, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender.'

"It is contended this instruction imposed upon appellant duties (1) so to equip its tender as to render the act of coupling and uncoupling reasonably safe under all circumstances, and (2) to use the safest known appliances rather than the type approved by common usage in the business.

"The instruction was error in appellant's favor. The applicable Safety Appliance Act provides: 'It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for the greater security to men in coupling and uncoupling cars.' The term 'cars' includes 'tenders.' The act contains an absolute command. It is not satisfied by the use of reasonable care to equip cars as it directs. The equipment must be in place and in operative condition if the car is used in interstate commerce. C., B. & Q. Ry. v. United States, 220 U. S. 574 et seq. It does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide

that some other appliance, so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission. The same act provided for automatic couplers which could be coupled and uncoupled 'without the necessity of men going between the ends of the cars' and separately provided that 'grab-irons or handholds' should be placed in the sides and ends of cars used in interstate commerce.

"It is clear Congress intended to and did require both the automatic coupler, which included its uncoupling lever or pin-lifting rod, and, in addition, required grab-irons or handholds to be placed in the ends and sides of cars. The instruction, therefore, was erroneously favorable to appellant in permitting the jury to exonerate it if it had failed to place grab-irons on its tender but had offered a substitute in the form of a pin-lifting or uncoupling rod. That the act did not contemplate such a substitution is clear from its terms. It has been so held by one Federal Court. United States v. Ry., 184 Fed. 94; United States v. Ry., 184 Fed. 99. Either automatic couplers, with their uncoupling levers were in use and upon cars when the applicable Safety Appliance Act was passed or they were not. If they were not in use, it is impossible that Congress had them in mind in requiring grab-irons in the end of cars. If they were in use, then the act clearly contemplated grab-irons in addition to them in order to afford employes 'greater security' than was then afforded by whatever appliances were upon the cars. It is true there are decisions which construe the act otherwise, but the cases cited are in better accord with its language and the circumstances attending its passage.

"Further, even if railroads may satisfy the act by using substitutes for grab-irons, it is not possible to believe the modification could have the meaning attributed to it by appellant.

"Taken as a whole, as it must be, the instruction authorized the jury to exonerate the defendant, so far as concerned the absence of grab-irons from the tender, if they found the pin-lifting rod was so constructed that it would easily be grasped and furnished employees security reasonable when compared with that which would have been afforded by the grab-irons had they been fixed in the end of the tender as the terms of the act required. The instruction told the jury that 'any iron rod or iron device securely fastened upon the end of defendant's tender to which employes could conveniently catch hold * * was a hand-hold or grab-iron within the meaning of the law.' That the jury could have construed the clause added by the court so to modify this explicit declaration as to require them, before finding for defendant, to find that the substituted device afforded employees, in coupling and uncoupling cars, reasonable security or any degree of security from danger not incident to such work is inconceivable unless we are to assume the jury's intelligence was of a very low order. That assumption will not be made. The instruction was not misleading and contained no error against appellant.

"IX. It is insisted the verdict is excessive. At the time he was injured, June 9, 1910, respondent was twenty-two years old, and was earning from $75.00 to $100.00 per month. Prior to that time his health had been excellent. As a result of his injuries he has lost both hands and one of his legs was broken and so injured

that it is two and one-half inches shorter than the other and its use much impaired otherwise. He suffered greatly as the immediate result of his injuries and still suffers therefrom. He is practically helpless, being unable even to feed himself. He is able to walk but little and that little is difficult and painful. His expectancy at the time he was injured was about forty years. His earning power is practically destroyed. He testified there was nothing he could do to earn anything and little effort was made to combat that testimony. In the very morning of life he is suddenly rendered helpless and subjected to tortures of both body and mind which are hardly to be described. Scullin v. Railroad, 184 Mo. l. c. 709; Markey v. Railroad, 185 Mo. l. c. 364 et seq.; Hill v. Power Co., 260 Mo. l. c. 43; Lessenden v. Ry., 238 Mo. l. c. 266, 267; Yost v. Railroad, 245 Mo. l. c. 252, 253. The affirmance of judgments for $20,000.00 for the loss of both legs is not unusual in this court. Such an infliction leaves many occupations open to the victim. The loss of both hands more seriously diminishes earning power, nearly or practically destroying it, and entails much greater expense in the matter of personal attendance necessitated by the helplessness resulting from such an injury. The judgment is not excessive.

"X. Other errors are assigned but a careful examination of them all in the light of what has been said discloses no prejudice to appellant's rights. The case was well tried, and the verdict is in just accord with the grievousness of the injuries inflicted. The judgment is affirmed. All concur except Woodson, J., not sitting.

James T. Blair, J."

Thereafter the railroad company filed its motion for re-hearing, as follows: (Caption omitted).

"The appellant, The St. Joseph & Grand Island Railway Company, prays the Court to grant it a re-hearing in this case, and as grounds therefor states:

I.

"The Court has overlooked the fact, duly submitted by counsel, that respondent sought to recover under the first count of his petition upon specific and positive allegations to the effect that he went behind a tender attached to one of appellant's engines when the engine and tender were stationary, for the purpose of attempting to open the knuckle attached to the tender, which had become defective to such an extent that it could not be opened with the pin-lifting rod and other appliances, and that while in the act of opening the knuckle with his hands the engine and tender were suddenly backed upon and over him without any signal having been given by him for the backing of the engine.

"Respondent testified in the most positive manner that the engine and tender were stationary when he went behind the tender, and that while attempting to open the knuckle with his hands the engine and tender were backed over him without any signal having been given by him to back the engine, and that as a result of the backing of the engine he was caught and mangled.

"We had believed the law in this state to be definitely and finally settled to the effect that if

a plaintiff recover he must recover under the allegations of his petition and the proof adduced in support thereof.

"Certainly it does not need argument to establish the fact that the defective coupling apparatus could not of itself have injured respondent, and it is equally certain that the alleged lack of grab-irons could not have injured respondent or in any way contributed to his injury, unless the engine backed upon him or was moving when he stepped behind the tender. Respondent at no time contended or pretended that he could have been injured had it not been for the fact that appellant's engine was negligently backed in the manner described by him. He did not allege in his petition that he went behind the tender while it was in motion, and that he had a right so to do in the performance of his duties, nor did he testify to any such facts. His evidence followed the allegations of his petition. In that respect at least he was consistent.

"If it be conceded that the coupling apparatus was defective and that the tender was not properly equipped with grab-irons, it must nevertheless be evident that the backing of the engine was the proximate cause of the injuries sustained by respondent. In any event it was one of the contributing causes and respondent's petition stated no cause of action, unless the allegation of the negligent backing of the engine be coupled with the allegations of a defective coupling apparatus and the lack of grab-irons. It took the combined allegations of negligence to make out a cause of action against the appellant.

"Under the allegations contained in respondent's petition and under the proof adduced in

support thereof, was the trial court justified in submitting to the jury the question as to whether respondent was injured or could have been injured by the alleged defective coupling apparatus and on account of lack of proper grab-irons, without submitting to the jury the question as to whether appellant's engine was negligently backed upon him? In other words was the court justified in submitting to the jury the question as to whether the alleged defective coupling device could have injured respondent, in the absence of any other showing of negligence upon the part of appellant? We respectfully submit that in order to justify such action upon the part of the trial court the law of negligence in this state must be changed and yet that is exactly what the trial court did, and what this court has said the trial court was justified in doing.

"Respondent's instruction numbered one declared the law to be just what I have endeavored to show the court the law is not and never has been. The instruction told the jury that if they believed from the evidence that respondent, while in the exercise of ordinary care, went behind appellant's tender for the purpose of opening the coupling apparatus attached thereto which had become defective and would not couple automatically and that if appellant had failed to have its tender properly equipped with grab-irons as provided by law and that while so engaged he was run upon and over by appellant's tender and engine then the verdict of the jury should be for the respondent on the first count of his petition.

"The instruction left the jury free to find that defendant's engine and tender were moving at the time respondent went behind the tender and this in spite of the allegations of his petition

and his own solemn sworn statements to the contrary. We are not now arguing that respondent might not have stated a cause of action had he alleged that he went behind the tender while it was in motion for the purpose of opening the defective coupling apparatus, and that while so engaged he was injured. We are merely stating that under the law, as heretofore declared by the appellate courts of this state, respondent could not allege that the accident occurred in one way, and support the allegations of his petition by his own solemn testimony, and then be permitted to come into court and recover upon an entirely different theory, even though this different theory be supported by the evidence of appellant. We believe the law to this effect is well settled in this state.

"Judge Valliant in the case of Behen v. Transit Company, 186 Mo. 430, said:

" 'Before the plaintiff in this case can avail himself of the defendant's testimony * * he will have to confess that all of the evidence adduced in his behalf was untrue * * and that only that part of defendant's testimony that suited the plaintiff's case was worthy of belief. A party will not be allowed to take such a position.'

"In the case of Milliken v. Com. Co., 202 Mo. 637 l. c. 654, it is said:

" 'It is a well established rule of pleading that a party cannot state one cause of action and recover on a different one.'

"Again this court in the case of Koenig v. U. D. Ry., 173 Mo. 698 l. c. 724, said:

" 'This instruction is vicious because of the fact of its not being in accord with the allegations

of the petition upon which the case was submitted to the jury.'

"The rule is again stated in the case of Black v. Railroad, 217 Mo. 672, as follows:

" 'A court does not possess the power to change by instruction the issue which the pleadings permit.'

"We must believe that the above authorities were overlooked and that the viciousness of respondent's instruction was not fully realized by the court.

"Again we wish to call to the court's attention the error committed by the trial court by amending appellant's instruction numbered three by inserting therein the following words:

" 'And that said attachments or devices furnished reasonable security to the employees of the appellant in coupling and uncoupling said tender and cars.'

"The law did not obligate the appellant to provide grab-irons which would furnish reasonable security to its employees in coupling and uncoupling cars. Section four of the Safety Appliances Act provides that grab-irons shall be furnished 'for greater security of men in coupling and uncoupling cars.'

"We cannot believe that the language of the Act as quoted contemplates that a railroad company shall so equip its cars with grab-irons as to render the work of coupling and uncoupling cars reasonably safe. It is always a hazardous undertaking to couple and uncouple cars, and especially is this so when it becames necessary to go between cars to perform this service. This being true, we repeat that it can not be possible that Congress intended to provide that railroad

companies should provide grab-irons of such character and so located, as would render the work reasonably safe. We do not believe that the law imposes or was ever intended to impose any such burden upon railroad companies. It is possible to provide grab-irons that will give 'greater security to men in coupling and uncoupling cars' but it is not possible to provide grab-irons which will render such hazardous work reasonably safe.

"We are constrained to believe that this point which we urged with so much confidence in our brief was overlooked by the court, or that it was so feebly presented as not to impress the court with its importance.

III.

"When the trial court told the jury that it might return a verdict for respondent in any sum not exceeding 'the sum of one hundred thousand dollars,' it thereby injected into the case a venomous poison for which there was no antidote. The court thereby said that it would affix its stamp of approval upon any verdict which the jury might return under one hundred thousand dollars.

"Respondent was grievously injured, and the jury needed no encouragement from the court to arouse their sympathies and prejudices, and to stimulate their imaginations. This court has said that it is wrong to give such instructions, and that the court was right when it made this statement, is evidenced by the judgment returned by the jury in this case. No verdict of so large an amount has ever been approved by this court in any other similar character.

"Believing, as we do, that under all the circumstances surrounding this case we were entitled to have a verdict from a jury uninfluenced by judicial hint or approval, we urge upon the court that it again place its stamp of disapproval upon this character of instruction, and that it give to this appellant an equal chance under the law to establish its rights before a jury uninfluence by any opinion or suggestion from the trial court as to what would be a reasonable verdict, in the event the jury should again find in respondent's favor.

"The case of Lessenden v. Railroad, 238 Mo. 247 and Appelgate v. Railroad, 252 Mo. 173, cited in our brief and quoted from at length, were evidently overlooked by the court, and in our very humble opinion they should be conclusive as to appellant's right to have the judgment and decision of the trial court set aside and a new trial granted to it."

The railroad company also filed its motion to transfer the cause to the court en banc, as follows: (caption omitted):

"The appellant asks that this case be transferred to court en banc and as ground therefor states:

I.

"Respondent in his petition alleged violations of the Safety Appliances Act by appellant, which he alleged resulted in respondent's injury.

"A federal question being involved in the construction of the Safety Appliances Act, appellant filed in the Circuit Court of Buchanan

County, Missouri, its petition and bond praying a removal of this cause to the Federal Court. The petition being denied the case was tried in the Circuit Court of Buchanan County, Missouri.

"Appellant states that inasmuch as a federal question is involved, the case should, if it so requests, under Section 4 of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri, be transferred to court en banc, and appellant asks that the case be so transferred in accordance with such provision of the Constitution.

II.

"Respondent in his petition alleged that appellant had been guilty of negligence in failing to have proper grab-irons attached to the rear end of its tender, in accordance with the Act of Congress commonly known and designated as the 'Safety Appliances Act.' It therefore became necessary in the trial of the cause for the trial court to construe said Act of Congress, with respect to the character of grab-irons which should be used, in accordance with the provisions thereof, and the court did so construe said act of congress in the giving of instructions on behalf of respondent, and especially in the giving of respondent's instruction numbered one, which attempted to define the character of grab-irons provided for by such act of congress.

"The court also, in giving instruction numbered three on behalf of the appellant as modified by the court again defined the character of grab-irons provided for by the act of congress.

"Appellant states that in the construction of said Safety Appliances Act a federal question

was and is involved and that under said Section 4, of the Amendment of 1890 to Article VI, of the Constitution of the State of Missouri, the case should if requested by appellant, be transferred to court en banc, and appellant prays an order of the court so transferring the same.

III.

"Respondent in his petition alleged that at the time he was injured he was engaged in interstate commerce. It therefore became necessary for the trial court to construe the acts of congress relating to persons injured while engaged in interstate commerce; that such questions were federal questions and that by reason of the federal questions involved appellant is entitled to have this case transferred to court en banc, under Section 4, of the 1890 Amendment of Article VI, of the Constitution of the State of Missouri, and appellant prays an order of the court transferring this cause to court en banc, in accordance with such provisions of the Constitution."
Both of these motions were overruled.

Thereafter the motion to transfer to the court en banc was renewed as follows (caption omitted):

"The appellant asks that this case be transferred to court en banc, and as grounds therefor states:

I.

"Respondent in his petition alleged that while employed by appellant in interstate com-

merce he was injured while in the performance of his duties, and he sought to recover damages for such injuries by reason of the provisions of an Act of the Congress of the United States, commonly known and designated as the Safety Appliances Act, and by reason of the provisions of another Act of the Congress of the United States, commonly known and designated as the Federal Employers' Liability Act. Federal questions thus being involved, appellant timely filed in the Circuit Court of Buchanan County, Missouri, where this cause was then pending, its petition and bond praying a removal of this case to the District Court of the United States for the St. Joseph Division of the Western District of Missouri. The petition was denied and the case was tried in said Circuit Court of Buchanan County, Missouri.

"Appellant states that inasmuch as federal questions were raised in respondent's petition and in appellant's petition for removal, the case is, under Section 4, of the amendment of 1890 to Article VI of the Constitution of the States of Missouri, transferable to court en banc, and appellant asks that the case be so transferred in accordance with such provision of the Constitution.

II.

"Respondent in his petition alleged that while the appellant was engaged in interstate commerce, and while respondent was engaged in such interstate commerce for appellant, he sustained certain injuries by reason of the fact that appellant had been guilty of negligence in failing to provide upon the rear of one of its ten-

ders, around and with which respondent was engaged in the performance of his duties, proper hand-holds or grab-irons, or any hand-holds or grab-irons, and by reason of the further fact that the coupling device upon said tender was defective and respondent sought to recover damages from appellant by virtue of the provisions of a certain Act of Congress of the United States, commonly known and designated as the Safety Appliances Act, which provides, among other things, the character of grab-irons or hand-holds which railroad companies shall provide for the use of their employees, and that couplings must not be defective. Respondent also sought to recover damages for the injuries sustained by him by reason of the provisions of a certain Act of the Congress of the United States, commonly known and designated as the Federal Employers' Liability Act. During the trial of this cause it became necessary for the trial court to construe said Acts of Congress, and they were so construed by said court in the instructions submitted by the court to the jury.

"Appellant states that on the appeal in this case it became necessary for this court to review the instructions of the trial court, and to construe the Acts of Congress above referred to, and that this court did so review said instructions and did construe said Acts of Congress, and that it defined the character of grab-irons required by Congress to be used; that in the giving and reviewing of said instructions, and in the construction of said Acts of Congress, federal questions were, and are involved, and that under said Section 4 of the amendment of 1890 to Article VI of the Constitution of the State of Missouri, the case is transferable to court en banc, and appellant prays

an order of the court so transferring the same." This motion was also overruled.

Thereupon a petition for a writ of error was sued out to this Court and the following assignment of errors was filed by the plaintiff in error (caption omitted):

"Comes now the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above entitled cause, there is manifest error in this, to wit:

"First. The Supreme Court of the State of Missouri erred in holding that the petition of the plaintiff in error, which was filed in the trial court for the removal of this cause to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri was properly denied, and in holding that notwithstanding the filing of said petition for removal and a sufficient bond therewith, the State Court had jurisdiction to try and determine the cause. This cause was instituted and said application for removel made prior to the amendment of Section 28 of the Judicial Code of the United States, which became effective January 1, 1912, and by which, for the first time, limitation was placed upon the character of controversies removable to the Courts of the United States on account of diversity of citizenship of the parties thereto. Said Supreme Court therefore erred in affirming the judgment of the trial court for the reason that neither the trial court nor said Supreme Court had jurisdiction of the cause, which upon the filing of said petition and bond for removal was, by virtue thereof, transferred to said

Circuit Court of the United States and all further proceedings therein in the State Courts were and are null and void.

"Second. Said Supreme Court erred in holding that instruction numbered one, given to the jury by the trial court for the defendant in error, correctly stated the issues and the law of the case and in holding that the defendant in error could recover under the pleadings on the theory that he was injured when he went behind a moving engine and tender, while they were backing up, for the purpose of adjusting a defective coupler, notwithstanding the fact that in his petition and in his oral testimony he stated that the engine and tender were stationary when he went behind the tender; said instruction complained of is as follows:

" 'The court instructs the jury that if you find from the evidence that on the 9th day of June, 1910, the defendant was a common carrier, engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler designed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, and you find from the evidence that said tender was not provided with secure

grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand holds on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in the performance of his duties working in interstate commerce for defendant in coupling and uncoupling said tender to cars and was between the end of said tender and cars, and while in the exercise of ordinary care was, by reason of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars (provided you so find), and because of the failure of the defendant company to provide said tender with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), and because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender and the steps or stirrups on said tender, mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender (pro-

vided you so find), run against, upon and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition.'

"Third. Said Supreme Court erred in holding that said instruction No. 1, given by the trial court for the defendant in error, correctly stated the law with respect to the liability of plaintiff in error, on account of the alleged absence of grab-irons or hand-holds on its tender, and in holding that the words therein contained, which are as follows: 'And because of the fact that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for the greater security,' etc., did not incorrectly advise the jury that such ladder and pin-lifting rod were not grab-irons or hand-holds within the meaning of the Federal Safety Appliances Act.

"Fourth. Said Supreme Court erred in approving the action of the trial court in modifying defendant's instruction No. 3 and giving said instruction as modified. The instruction as modified told the jury that the attachments or devices upon the end of the tender should have furnished reasonable security to the employees of the defendant in the performance of their duties, when the law imposed no such duty or obligation upon the plaintiff in error. The instruction as modified and given by the trial court is as follows:

" 'The court instructs you that at the time plaintiff was injured the law did not prescribe any fixed or definite character of hand-holds or grab-

irons to be placed upon the rear ends of tenders, nor did it prescribe just where they should be attached. The defendant was only required to have upon the rear ends of its tender secure hand-holds or grab-irons for the greater security of its employees in coupling and uncoupling cars. Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law, and if you believe from the evidence that there was upon each corner of defendant's tender a vertical iron hand-hold or grab-iron securely fastened and so located as to be within easy reach of defendant's employees while standing near the corners of said tender in the performance of their duties in coupling and uncoupling cars, and that there extended across the rear end of the tender an iron rod just above the coupler, being so fastened and constructed as to permit defendant's employees, while in the performance of their duties in coupling and uncoupling cars, to readily grab hold of the same for their better security while in the performance of such work, **and that said attachments or devices furnished reasonable security to the employees of defendant in coupling and uncoupling said tender and cars,** then the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons for the use of plaintiff or other employees, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the lack of proper and necessary hand-holds or grab-irons upon the rear end of defendant's tender.'

"The words in black-face were inserted by the Court over the objection of plaintiff in error.

"Fifth. Said Supreme Court erred in holding in its approval of the above instruction that the Federal Safety Appliances Act 'does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance so constructed that it may be grasped may serve instead of grab-irons and excuse their omission.' And in holding that the Act required grab-irons or hand-holds (technically so called) in addition to other appliances which might be conveniently and securely located, and which might serve every purpose of a hand-hold or grab-iron, although at the same time serving some other purpose.

"Sixth. Said Supreme Court erred in holding that defendant in error could recover under his petition and his evidence, which charged the plaintiff in error with negligently backing an engine and tender upon and over him without a signal, even though such allegation in his petition and his evidence were false, and in permitting to recover upon a theory and upon a state of facts which he solemnly denied under oath. For this reason said Supreme Court erred in holding that instruction marked "A" requested of the trial court by plaintiff in error was properly refused, and in approving the action of the trial court in refusing said instruction, which is as follows:

" 'If you believe from the evidence that the defendant's engineer did not back the engine up without a signal from the plaintiff, then your verdict will be for the defendant on both counts of the petition.'

"Seventh. Said Supreme Court erred in holding that the defendant in error was entitled to recover under the evidence in the case, and in holding that the evidence in the case sustained the issues made by the pleadings.

"Eighth. Said Supreme Court erred in overruling the motion or petition filed by plaintiff in error praying that the cause be transferred to the Supreme Court of Missouri en banc, and in refusing to so transfer said cause. Said Supreme Court of Missouri is composed of two divisions designated as Divisions Nos. 1 and 2, and under the provisions of the Constitution of the State of Missouri the Supreme Court of Missouri en banc is constituted by both divisions of the Supreme Court sitting together. Federal questions were involved in the case, and the Constitution of the State of Missouri provides that under such circumstances a case shall be transferred to the Supreme Court en banc, upon the application of the losing party thereto.

"Ninth. The Supreme Court in refusing to transfer this case to the court en banc denied to plaintiff in error the equal protection of the law, and sought to take its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

ARGUMENT

I.

The verdict and judgment in this case, upon one of the grounds of negligence, sufficient to support a recovery, pleaded in the plaintiff's petition, supported by the evidence, and fairly and correctly submitted to the jury under plaintiff's instruction numbered one, is valid and sound, and free from any attack made in any of the assignments of error presented by the plaintiff in error herein, and involves no controlling federal question upon which a writ of error to this Court could properly be based. This writ of error should, therefore, be dismissed, or the judgment of the Missouri Supreme Court affirmed.

The amended petition filed by Moore, upon which this case was tried, alleged, and it was admitted during the couse of the trial by the railway company, that at the time Moore received the injuries sued for, the railway company was engaged as a common carrier by railroad in interstate commerce between the several states of Missouri, Kansas, Nebraska and other states; and at the time he was injured Moore was in the employ of the railway company and working in interstate commerce.

The petition further alleged the following distinct and separate acts of negligence by the defendant:

First, The act of defendant in hauling the tender not equipped with a coupler which could be coupled without the necessity of men going between the end of the tender and cars;

Second. The act of the defendant in not equipping the tender of the engine with secure grab-irons or hand-holds in the end of the tender for the greater security of men in coupling and uncoupling cars; and

Third, The act of the defendant in backing the engine without a signal from Moore.

The petition further alleged that Moore, while in the performance of his duties and in the exercise of ordinary care, was compelled to go upon the track of the defendant company and between the tender and the end of the car to which it was to be coupled, on account of a defective condition in said coupler, and for the purpose of adjusting by hand the coupler so that the same could, and would be made to, couple with the car to which it was desired to attach the same; and further alleged that the plaintiff was injured:

A, On account of the negligent, wrongful and unlawful act of the defendant in hauling and permitting to be hauled and used upon its line said tender without the same being provided with secure grab-irons or any hand-holds in the end of the said tender for the greater security to defendant's employees and this plaintiff in coupling and uncoupling cars; and

B, On account of the negligent, wrongful and unlawful act of the defendant in hauling and permitting to be hauled and used on its line said tender equipped with a coupler and its parts and attachments in a defective condition; and

C, On account of the carelessness and negligence of the defendant and its agents and servants controlling the movements of said engine and tender in carelessly and negligently causing such engine and tender to be backed without any signal from the plaintiff.

The evidence supported each and every allegation of the petition.

The plaintiff's instruction numbered one, in addition to requiring the jury to find other facts and acts of negligence, required them to find the following facts before they could return a verdict in favor of Moore.

That the defendant, at the time of the injury to Moore was a common carrier, engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, Number 45, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler designed to couple automatically by impact and to be uncoupled, without the necessity of men going between the end of such tender and cars; and that on the date of the injury to Moore, and prior thereto, said coupler would not work or accomplish the purpose for

which it was designed, and would not couple automatically by impact and could not be uncoupled, without the necessity of men going between the end of said tender and the end of cars; and that plaintiff, while in the employ of the defendant, and while in the performance of his duties and working in interstate commerce, and while in the exercise of ordinary care, was, by reason of the fact that such coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact and could not be uncoupled, without the necessity of men going between the end of said tender and the end of cars, run against, upon and over by said tender and engine.

It will thus be seen that upon this one ground of negligence: first, pleaded in Moore's petition; second, supported by the evidence; third, found by a jury, under an instruction requiring the finding of every essential fact necessary to a recovery; fourth, not attacked in any of the assignments of error presented by plaintiff in error herein to this Court; and fifth, involving no disputed federal question upon which a writ of error to this court could properly be based, the writ of error herein should be dismissed, or the judgment of the Supreme Court of the State of Missouri, upholding the verdict, should be affirmed and this without any regard to any other questions raised by the assignments of error, to be hereafter discussed.

II.

This cause, being instituted in the State Court of Missouri on the 3d day of February, 1911, returnable to the May, 1911, term of the Court, to recover damages under the Federal Employers' Liability Act for an injury sustained by Moore on the 9th day of June, 1910, was not removable to the United States Circuit Court. This identical question, presented in plaintiff in error's first assignment of error, has been passed upon by this Court, adversely to the contention of plaintiff in error in Kansas City So. Ry. v Leslie, 238 U. S., 599, 59 L. Ed. 1478.

III.

The plaintiff in error's second assignment of error, specifying that the Missouri Supreme Court erred in holding "that instruction number one given to the jury by the trial court correctly stated the issues and law, in holding that defendant in error could recover under the pleadings on the theory that he was injured when he went behind a moving engine and tender while they were backing up, for the purpose of adjusting a defective coupler, notwithstanding the fact that in his petition and in his oral testimony he stated that the engine and tender were stationary when he went behind the tender" is

(a) Wholly without merit.

The amended petition upon which the case was tried does not state that the engine and tender were

stationary when he went behind the tender, but does state, as one among several acts of negligence, that "while in the performance of his duties and in the exercise of care and caution he was working upon, about and near said engine and tender and upon said defendant's track * * and while so doing it was necessary for him to go between the tender and the end of cars for the purpose of working by hand said coupler, so that the same could, and would be made to, couple with the car to which it was designed to attach the same; that he was compelled to go upon said track at said point and between the tender and car to which it was to be coupled on account of the defective condition of said coupler, and while so engaged the defendant company and its agents and servants in charge of said engine and tender, so equipped with said coupler in said defective condition, and controlling its movements, carelessly and negilgently, while engaged in interstate commerce, backed said engine and tender * * against, upon and over plaintiff, without any signal from plaintiff."

In its motion for rehearing, filed in the Supreme Court of Missouri, defendant's position with regard to this assignment of error is thus stated:

> "The instruction left the jury free to find that the defendant's engine and tender were moving at the time respondent went behind the tender, and this in spite of the allegations of his petition and his own solemn sworn statements to the contrary. We are not now arguing that respondent might not have stated a cause of action had he alleged that he went behind the tender while

it was in motion for the purpose of opening the defective coupling apparatus, and that while so engaged he was injured. We are merely stating that under the law as heretofore declared by the appellate courts of this state respondent could not allege that the accident occurred in one way and support the allegations of his petition by his own solemn testimony, and then be permitted to come into court and recover upon an entirely different theory, even though this different theory be supported by the evidence of appellant."

That the plaintiff in error has misconceived the allegations of Moore's petition is clear without argument; but the matter was passed upon by the Supreme Court of Missouri and they construed plaintiff's petition to contain the separate and distinct allegations of negligence, one of which was that the railway company negligently backed the engine, without a signal from Moore.

It cannot be controverted that the plaintiff's petition alleges that the engine was being backed, and ran upon and over Moore. It was not essential to a recovery on the other grounds of negligence that the backing of the engine should have been negligently done. The decision of the Supreme Court of Missouri in this matter is very clear. That portion of the opinion dealing with this question is as follows:

"Appellant's chief contention in this connection is that since the instruction did not require the jury to find that the engine was negligently backed against respondent it ignores one

allegation of negligence and is erroneous for that reason. It is not perceived in what way appellant could have been injured by the elimination from the instruction of one of the grounds authorizing, if proved, a recovery. It is indisputable that plaintiff was entitled to recover if the tender was not equipped with grab-irons and an operative automatic coupler, in the manner required by the Safety Appliances Act, and if the absence of these, or either of them, contributed to his injury, and this without regard to any question of contributory negligence. * * That he might also be entitled to rely upon negligence in backing the engine without a signal could not defeat his right to rely upon concurrent negligent non-compliance with the Safety Appliances Act; such non-compliance accounting for his presence in the course of duty behind the tender, and largely diminishing the probabilities of his saving himself from injury as the tender moved against him, if respondent's evidence is to be believed. The jury evidently believed it."

(b) Not reviewable under a writ of error by this Court.

Under a writ of error to the State Court the Supreme Court of the United States may not consider merely incidental questions, not federal in character; that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the federal statute. Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 35 S. C. R. 481, 59 L. Ed. 777.

Questions in a suit under the Federal Employers' Liability Act which relate to matters of pleading, in-

volving no construction of the federal statute, cannot be considered on a writ of error from the federal Supreme Court to a State Court. Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 S. C. R. 865, 59 L. Ed. 1433.

Only in a case of palpable error should the Federal Supreme Court disturb on writ of error to the State Court a judgment in an action brought under the Federal Employers' Liability Act, which presents no question as to the interpretation of any provision of that statute or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case, for the purpose of determining whether there were matters for the consideration of the jury, the state courts, trial and appellate, having held that there were. Great Northern Railway v. Knapp, 240 U. S. 464, 36 S. C. R. 399.

IV.

The third assignment of error must fall with the mere reading of plaintiff's first instruction. The railway company's contention is that the instruction assumed that the ladder and pin-lifting rod on the rear of the tender were not grab-irons or hand-holds within the meaning of the Federal Safety Appliances Act. No such meaning can be attributed to the language of this instruction. The instruction requires the jury to find, among other facts, the following:

> " * * and you find from the evidence that said tender was not provided with secure grab-irons or hand-holds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular hand-holds on the rear corners of said tender, and the steps or stirrups on said tender, mentioned in evidence, did not afford the same or equal security as grab-irons or hand-holds placed in the end of said tender for greater security to men in coupling and uncoupling said tender."

So frivolous is the railway company's contention upon this point that we find the matter dealt with in the following language in the opinion by the Missouri Supreme Court:

> "It is also contended that the instruction assumes that the pin-lifting rod or uncoupling rod upon the rear of the tender was not a grab-iron within the meaning of the act, requiring grab-irons. There is no doubt that an instruction assuming as true a material fact in controversy is erroneous. It is manifest, however, from reading the instruction that it contains no such assumption as charged, and neither analysis or discussion is necessary to disclose the fact."

V.

The railway company's fourth assignment of error arises from the interpolation by the trial court of a certain clause into the defendant's instruction numbered three. As originally offered the instruction

was objected to by Moore and as modified and given the instruction was objected to by both parties.

This instruction had to do with the perpendicular hand-holds on the sides or corner of the tender and the iron rod extending across the rear of the tender, above the coupler being a part of the coupling device, and used to lift the pin in the automatic coupler and designed to be operated from the side of the car. The evidence of the plaintiff's witnesses and the evidence as to where and how this rod was fastened on the tender, conclusively showed that the pin-lifting rod was not secure or intended to be secure; that it was placed upon the rear of the tender designed to turn and would turn; that it also had lateral motion in the loops by means of which it was fastened to the rear of the tender; that it was not the size of a grab-iron or hand-hold and was placed too close to the tender to permit employees to grab hold of it and use it as a grab-iron.

Instruction No. 3, as offered by the defendant, was intended to submit to the jury the question of whether or not the placing of the "turning and movable pin-lifting rod, not firmly secured, with lateral motion, and located in a position so close to the tender that it could not be grabbed by an employee," upon the rear of the tender was a compliance with the Safety Appliances Act, which made it unlawful for the defendant to use any car in interstate commerce that was not provided with **secure grab-irons or handholds in the ends and sides of each car,** for greater security to men in coupling and uncoupling cars, which act was amended to apply to engine tenders, as well.

The instruction as originally asked was clearly erroneous in many respects, but essentially in that part of the instruction which said:

> "Any iron rod or iron device, securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling and uncoupling cars was a grab-iron within the meaning of the law, and if you believe from the evidence * * that there extended across the rear end of the tender an iron rod, just above the coupler, being so fastened and constructed as to permit defendant's employees while in the performance of their duties in coupling and uncoupling cars to readily grab hold of the same for their better security while in the performance of such work, then the defendant was not guilty of negligence in failing to provide **necessary and proper hand-holds or grab-irons** for the use of plaintiff or other employees, and plaintiff cannot recover any sum on account of any injuries alleged to have been sustained by reason of the **lack of proper and necessary hand-holds or grab-irons** upon the rear end of defendant's tender."

It will be seen that in this instruction the defendant not only asserted the right to avoid the requirements of the Safety Appliances Act with reference to equipping the rear of its tender with secure hand-holds or grab-irons, by furnishing a substitute therefor; but also took from the jury the determination of the question of whether or not the pin-lifting rod was a fair and substantial compliance with the act and declared as a matter of law that the pin-lifting rod, if it was so

fastened and constructed as to permit defendant's employees while in the performance of their duties in coupling and uncoupling cars to readily grab hold of the same for their better security while in the performance of such work, was a compliance with the act.

There is a vast difference between "any iron rod or iron device securely fastened upon the end of defendant's tender" and "a secure grab-iron or hand-hold in the end of the tender." The pin-lifting rod was securely fastened upon the end of the tender in the sense that it would not come off, but it was not the equivalent of a secure hand-hold for the reason that a secure hand-hold is a firmly fixed support. The "securely fastened" pin-lifting rod had lateral motion in the brackets which held it, as well as a turning motion in the brackets.

Again, there is a vast difference in the safety to an employee in the use of "an iron rod just above the coupler, and being so fastened and constructed as to permit defendant's employees while in the performance of their duties in coupling and uncoupling cars to readily grab hold of the same for their better security" and "a secure hand-hold" which, after it has been "readily grabbed" gives a firm support to an employee. There might be many iron rods so fastened and constructed as to permit an employee to readily grab hold of the same that would not give the same or equal security as a "secure grab-iron." There is little security in an iron that turns when grasped and slides from side to side; while in a secure hand-hold there is, it might be said, positive safety.

Again, what must the Court say of an instruction which tells the jury that "any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling and uncoupling cars was a grab-iron within the meaning of the law" and that if they found that an iron rod extended across the rear of the tender just above the coupler, being so fastened and constructed as to permit its employees while in the performance of their duties in coupling and uncoupling cars to readily grab hold of the same for their better security while in the performance of said work, then the defendant was not guilty of negligence in failing to provide **"necessary and proper hand-holds or grab-irons,"** and that plaintiff could not recover by reason of the lack of **"proper and necessary hand-holds or grab-irons?"**

The instruction is self-contradictory. It undertakes to say, first that the pin-lifting rod was a proper device upon the rear of the tender, and then to say that there can be no recovery against the defendant for failure to have a "proper and necessary" device upon the rear of the tender. In other words it attempts to have the jury find that the pin-lifting rod was a proper device upon the rear of the tender, but that there was no liability in the event it was not a "necessary and proper" device; and this without any definition of what is or is not a "proper and necessary" device, and wholly ignoring and omitting any comparison with the "secure hand-hold or grab-iron" required by the Act.

The interpolation by the trial court in this instruction was meant to make a comparison with the requirements of the Safety Appliances Act and was so understood by the jury, the trial court and the Supreme Court of Missouri. It is contended by the plaintiff in error that this instruction imposed upon it the duty (1) so to equip its tender as to render the act of coupling and uncoupling reasonably safe under all circumstances and (2) to use the safest known appliances rather than the type approved by common usage in the business.

That the purpose and meaning of the interpolation had no such significance is well expressed in the opinion of the Missouri Supreme Court, as follows:

> "Further, even if railroads may satisfy the act by using substitutes for grab-irons, it is not possible to believe the modification could have the meaning attributed to it by appellant. Taken as a whole, as it must be, the instruction authorized the jury to exonerate the defendant so far as concerned the absence of grab-irons from the tender, if they found the pin-lifting rod was so constructed that it would easily be grasped and furnish employees security reasonable when compared with that which would have been afforded by grab-irons, had they been fixed in the ends of the tender as the terms of the Act required. The instruction told the jury that:
>
> "'Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold * * was a hand-hold or grab-iron within the meaning of the law.'

"That the jury could have construed the clause added by the court so to modify this explicit declaration as to require them, before finding for the defendant, to find that the substituted device afforded employees in coupling and uncoupling cars reasonable security, or any other degree of security from danger not incident to such work, is inconceivable unless we are to assume the jury's intelligence was of a very low order. The assumption will not be made. The instruction was not misleading and contained no error against appellant."

This court will notice that instruction No. 3, as asked by defendant, made no comparison of whatever nature or kind as to the security afforded employees by such a device as the pin-lifting rod and such a device as a "secure hand-hold"; and yet, even if it is the law that a railroad company may be absolved from liability by furnishing a substitute for the "secure hand-hold or grab-iron" required by the Safety Appliances Act, yet under any theory the substitute must afford the safety and protection to employees which the law contemplates and requires and must afford the person coupling or uncoupling cars equal security with a "secure grab-iron or hand-hold."

Regardless of what meaning may be given to the language interpolated by the trial court into this instruction No. 3, the giving of the instruction as modified was not error against the railway company, but in its favor. The instruction as originally asked was clearly indefensible and erroneous; as modified by the Court it was not an instruction which was in con-

flict with instruction No. 1 given on behalf of Moore. It did not pretend, regardless of what finding the jury might make under it, to authorize a verdict in favor of the plaintiff. It was an instruction that authorized and directed a verdict in favor of the defendant and exonerated the defendant from liability under the conditions therein stated.

Even if such a construction as the railway company contends for could be given to this instruction, yet the giving of it would not be error against the railway company, because the plaintiff could only have a verdict under the findings of fact required under his instruction No. 1; and if the court saw fit to say that if there was a device upon the rear of the tender which furnished reasonable safety to men in the performance of their duty that this would be a legal ground for exonerating the defendant from liability for failure to comply with the requirements of the Safety Appliances Act, the railway company cannot be heard to complain because of the fact that the Court is giving it an added, although illegal, avenue of escape from liability.

VI.

The railway company's fifth assignment of error complains that the Supreme Court of Missouri in its opinion was wrong in holding, in the discussion of defendant's instruction No. 3, as one of several reasons why the giving of the instruction was not error against the railway company, as follows:

"It is contended this instruction imposed upon appellant duties: (1) So to equip its tender as to render the act of coupling and uncouplin reasonably safe under all circumstances; and (2) to use the safest known appliances rather than the type approved by common usage in the business.

"The instruction was error in appellant's favor. The applicable Safety Appliance Act provides:

" 'It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. Act March 2, 1893 c. 196, Sec. 4, Stat. 531 (U. S. Comp. St. 1913, Sec. 8608).'

"The term 'car' includes 'tenders.' The act contains an absolute command. It is not satisfied by the use of reasonable care to equip cars as it directs. The equipment must be in place and in operative condition if the car is used in interstate commerce. C., B. & Q. Ry. v. United States, 220 U. S. 574 et seq., 31 Sup. Ct. 612, 55 L. Ed. 582. It does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance, so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission. The same act provided for automatic couplers which could be coupled and uncoupled 'without the necessity of men going between the ends of the cars' and separately provided that 'grab-irons or hand-holds' should be placed in the sides and ends of cars used in interstate commerce.

"It is clear Congress intended to and did require both the automatic coupler, which included its uncoupling lever or pin-lifting rod, and in addition, required grab-irons or handholds to be placed in the ends and sides of cars. The instruction therefore was erroneously favorable to appellant in permitting the jury to exonerate it if it had failed to place grab-irons on its tender, but had offered a substitute in the form of a pin-lifting or uncoupling rod. That the act did not contemplate such a substitution is clear from its terms. It has been so held by one federal court. United States v. Railway (D. C.) 184 Fed. 94; United States v. Railway (D. C.) 184 Fed. 99. Either automatic couplers with their uncoupling levers, were in use and upon cars when the applicable Safety Appliances Act was passed or they were not. If they were not in use, it is impossible that Congress had them in mind in requiring grab-irons in the end of cars. If they were in use, then the act clearly contemplated grab-irons in addition to them in order to afford employees' 'greater security' than was then afforded by whatever appliances were upon the cars. It is true there are decisions which construe the act otherwise, but the cases cited are in better accord with its language and the circumstances attending its passage."

The expression of these views by the Supreme Court of Missouri in so able and convincing a manner persuades us that Moore assumed an unnecessary burden in his instruction No. 1. By offering and adopting this instruction we realize that we adopted the theory which directed the jury to find for the defendant if the pin-lifting rod afforded the same or equal security

as "grab-irons or hand-holds placed in the end of the tender for greater security to men in coupling and uncoupling said tender." The holding by the Supreme Court of Missouri in this matter was not a necessary or controlling factor in the affirmance of the judgment and a discussion of the correctness of the views of that Court upon this question would avail nothing in the disposition of this case.

VII.

The railway company's sixth assignment of error complaining that the trial court erred in refusing defendant's instruction A, which is as follows:

> "If you believe from the evidence that the defendant's engineer did not back the engine up without a signal from the plaintiff, then your verdict will be for the defendant on both counts of the petition."

Is without merit, and directly in the teeth of a previous, controlling opinion by this Court, and is an effort to move this court to overrule its former opinion. Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 34 S. C. R. 581; 58 L. Ed. 838.

VIII.

The railway company's seventh assignment of error, as follows:

> "Said Supreme Court erred in holding that the defendant in error was entitled to recover

> under the evidence in the case and in holding that the evidence in the case sustained the issues made by the pleadings."

Is manifestly frivolous. It does not pretend to point out in what particular the issues made by the pleadings are not sustained by the evidence nor in what particular the evidence was deficient in establishing a right to recovery. Before the Supreme Court of Missouri the railway company contended that the verdict was against the great weight of the credible evidence in the case, but the Supreme Court of Missouri, after an examination of the entire record, voiced its opinion in these words:

> "It is insisted the judgment cannot stand because, it is argued, the verdict is against the great weight of all the credible evidence in the case. The general rule on appeals in actions at law is that, if there is substantial evidence tending to support the verdict, the jury's view of the weight of the evidence is accepted by this court. A careful examination of the entire record satisfies us this assignment is an effort to overthrow a verdict on the ground it is against the weight of the evidence. Respondent's evidence clearly tended to prove the negligence alleged. It is not contended it did not do so, except on the theory that it was so contradicted by appellant's evidence that its probative force was destroyed. In fact, however, some of the witnesses whose testimony is relied on as destroying respondent's evidence contradicted themselves. Some were contradicted by others of appellant's witnesses, and some contradicted physical facts tending to make out

respondent's case and shown beyond dispute by photographs offered by appellant. In these circumstances the usual rule applicable in cases tried on conflicting evidence unquestionably applies and the point is ruled against appellant. The decisions cited to the contrary do not deal with cases such as this, wherein is presented but another example of conflicting evidence, with substantial evidence supporting the verdict. In those cases is found something inherently improbable in the evidence held insufficient."

IX.

The railway company's eighth assignment of error is wholly without merit, and raises a question that is not a federal question or such a question as can be reviewed by this Court, for the following reasons:

The Supreme Court of the State of Missouri is composed of two divisions, which, when sitting together, are called the court en banc. Section 4 of the amendment of 1890 to Article VI of the Constitution of the State of Missouri is as follows:

> "Sec. 4. Case transferred to court en banc, when. When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party shall be transferred to the court for its decision; or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

The Supreme Court of Missouri properly construed this provision of the Constitution to mean that where a cause was pending in either division of the Supreme Court, the losing party in the trial court had the right to have the case transferred for hearing to the court en banc, if a federal question were involved, but did not have the right to submit the case to the division of the court in which it fell and then, after an adverse decision, seek a re-hearing before that division and when this was overruled obtain a new hearing before the court en banc. The court, in denying the motions to transfer the case to the court en banc determined that the losing party had waived any right he had under this provision of the Constitution, by submitting the cause to a division of the court for determination.

This court has repeatedly held that it has no jurisdiction to review the action of a Supreme Court of a state in construing a provision of its own State Constitution or a statute of the state. The construction placed upon the constitution of a statute of a state by its Supreme Court is conclusive upon this Court and no federal question such as would authorize a review by this Court can be raised as to the correct or incorrect interpretation given by the State Supreme Court concerning the Constitution or statutes of its own state.

Bi-Metallic Inv. Co. v. State Board of Equalization, U. S. Adv. Ops. 1915, p. 141;
Price v. People of Illinois, 238 U. S. 445, 59 L. Ed. 1400;

Republic Oil Co. v. State of Missouri, ex rel. 224 U. S. 271, 56 L. Ed. 760;
Welch v. Swazey, 214 U. S. 91, 53 L. Ed. 923.

But even if the Supreme Court of the State of Missouri were incorrect in its construction of the amendment to the State Constitution, the case was not transferable to court en banc, as held by it, for the reason that the judgment of the division of the Supreme Court did not involve the decision of a federal question as essential and necessary to the affirmance of the judgment. The judgment of the Supreme Court in holding a liability against the railway company on the ground of negligence in hauling the tender of the engine in interstate commerce equipped with a defective coupler, was not attacked in the motion for rehearing filed in that court, nor in either of the motions to transfer to court en banc, but only the proper construction of a pleading as to whether a liability would be permittel thereunder athough the backing of the engine was not done negligently. Neither is the liability upon this ground of negligence attacked in any assignment of error filed to this Court. Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, 53 L. Ed. 417.

X

The railway company's ninth assignment of error is so general in its nature as not be an aid to this court or to counsel for defendant in error in determining

what its complaint may be. We confess it is inconceivable to us how the railway company can have been denied the equal protection of the law or in what manner it is sought to take its property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, by the refusal of the division of the State Supreme Court to transfer the cause to court en banc.

As it appears to the defendant in error this threadbare claim of a violation of the Fourteenth Amendment of the United States' Constitution is put forward in an attempt to raise a question which, although frivolous, will gain it a delay in complying with the judgment of the Supreme Court of Missouri.

XI.

We respectfully submit:

First, That the writ of error herein should be dismissed, on the ground that the verdict must stand in favor of Moore for the reason that his injury resulted from a violation by the railway company of the Safety Appiances Act in not equipping its tender with an operative automatic coupler; and that as to this ground of liability, no federal question was raised or decided in the State Supreme Court or can be or is raised in this Court by the assignments of error by the plaintiff in error herein, which would give this Court jurisdiction to review the judgment of the State Court.

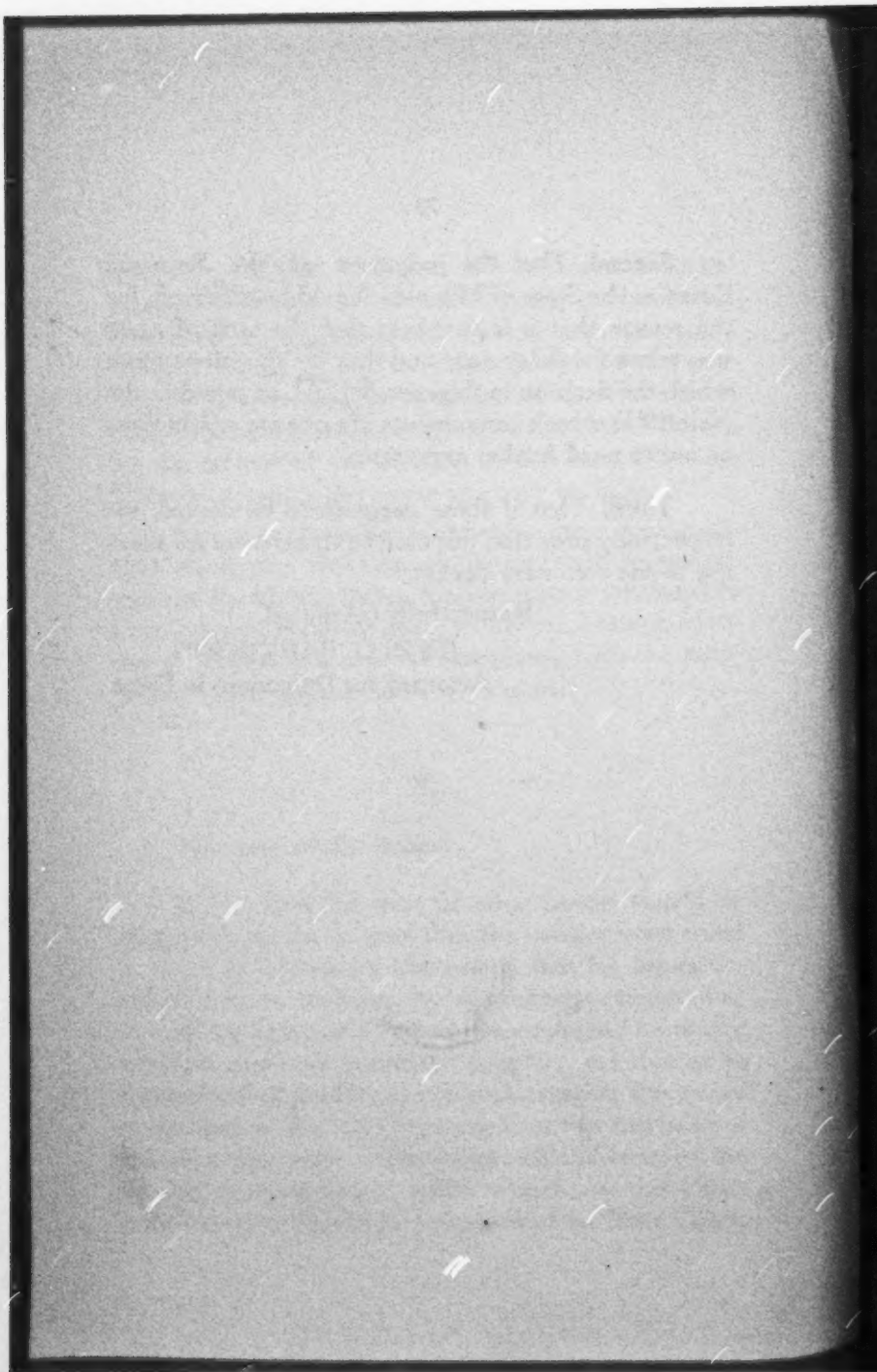
Second, That the judgment of the Supreme Court of the State of Missouri should be affirmed, for the reason that it is manifest that the writ of error was taken for delay only and that the questions upon which the decision in this case depend, as raised in the plaintiff in error's assignments of error are so frivolous as not to need further argument.

Third, That if these suggestions be denied, we respectfully pray that this case be transferred for hearing to the summary docket.

Respectfully submitted,

JOHN G. PARKINSON,

Attorney for Defendant in Error.



INDEX

I. Reference to controlling decisions..... 3

II. Facts it was necessary for the jury to find before returning a verdict for Moore.... 5

III. State of facts and evidence supporting Moore's contentions 6

Appendix "A"—Applicable sections of Employers' Liability Act..... 52

Appendix "B"—Applicable sections of Safety Appliance Acts..... 53

CASES CITED

Baltimore & Ohio Railroad Company v. Harvey W. C. Whitacre, U. S. Adv. Ops. 1916, 33... 3

C. M. & St. P. Ry. Co. v. Voelkner, 129 Fed. 522. 5

Grand Trunk Railway Co. v. Lindsey, 233 U. S. 421; 34 S. C. R. 581; 58 L. Ed. 838..... 4

Great Northern Railway v. Knapp, 240 U. S. 464; 36 S. C. R. 39; 60 L. Ed. 745..... 4

Milwaukee & St. P. Railway Company v. Kellogg, 94 U. S. 469, 24 L. Ed. 256..... 4

U. S. v. Nevada County Narrow Gauge Ry. Co., 167 Fed., 695..... 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 573

ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY,

Plaintiff in Error,

vs.

RALPH W. MOORE,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI

BRIEF, STATEMENT AND ARGUMENT FOR DEFENDANT IN ERROR

The first point made by defendant in error in his motion to affirm, or dismiss, or place upon the summary docket is as follows:

> **"The verdict and judgment in this case, upon one of the grounds of negligence** (permitting to be hauled or used on its line an engine tender used in interstate traffic, not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the end of the tender and cars) **sufficient to support a recovery, pleaded in the plaintiff's petition, supported by the evidence, and fairly and correctly submitted to the jury under plaintiff's instruction numbered one, is valid and sound, and free from any attack made in any of the assignments of error presented by the plaintiff in error herein, and involves no controlling federal question upon which a writ of error could properly be based. The writ of error should, therefore, be dismissed, or the judgment of the Missouri Supreme Court affirmed."**

In view of the admission made by the plaintiff in error in its statement and argument filed in opposition to the motion to dismiss, affirm, or transfer to the summary docket; that defendant in error's point one is well taken, if there was substantial evidence showing "that the coupler was defective and that it was a contributing cause of the accident, and that the verdict of the jury was bottomed upon this particular allegation of negligence," which admission is to be found on page 6 of plaintiff in error's statement and argument in opposition to the motion to dismiss, affirm or transfer to summary docket; and in view of the fact that a determination of defendant in error's point one in his favor disposes of the case insofar as a consideration of it by this Court is concerned; and

in view of the fact that all points made by plaintiff in error in its assignment of errors have been fully covered by defendant in error in his statement and argument upon the motion to dismiss the writ of error, or affirm the judgment, or transfer to the summary docket; we submit herein only:

(I) a reference to the controlling decisions of this Court;

(II) call attention to the facts which it was necessary for the jury to find in order to return a verdict in favor of Moore, under his instruction numbered one; and

(III) a statement of the pertinent facts and evidence sustaining Moore's contention as to the facts.

I

Only in case of clear and palpable error will a unanimous ruling of the highest state Court that the trial court had properly left to the jury a suit under the Employers' Liability Act of April 22, 1908 (35 Stat, at Large 65, ch. 149; Comp. Stat. 1913, Sec. 8657) be disturbed by the Supreme Court on a writ of error. Baltimore & Ohio Railroad Company v. Harvey W. C. Whitacre, U. S. Adv. Ops. 1916, 33.

Only in a case of palpable error should the Federal Supreme Court disturb on a writ of error to the State Court a judgment in an action brought under

the Federal Employers' Liability Act, which presents no question as to the interpretation of any provision of that statute or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury, the state Courts, trial and appellate, having held that there were. Great Northern Railway v. Knapp, 240 U. S. 464; 36 S. C. R. 39; 60 L. Ed. 745.

What is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. Milwaukee & St. P. Railway Company v. Kellogg, 94 U. S. 469, 24 L. Ed. 256.

The question as to whether or not an injury resulting to a switchman in entering between a tender and cars to adjust a coupler which could not be operated by the working of the uncoupling rod reaching to the side of the car, was proximately caused by the defect in the coupler is properly submitted to the jury. Grand Trunk Railway Co. v. Lindsey, 233 U. S. 421; 34 S. C. R. 581; 58 L. Ed. 838.

The preparation of the coupler for the impact is not distinct from the act of coupling. The prepara-

tion and the impact were connected and indispensable parts of the larger act which is regulated by the statute, and the performance of which was intended to be relieved from unnecessary risk and danger. Chicago, M. & St. P. Ry. Co. v. Voelkner, 129 Fed. 522; U. S. v. Nevada County Narrow Gauge Ry. Co. 167 Fed., 695.

II.

There could have been no verdict by the jury in favor of Moore under his instruction numbered one, unless the jury found, in addition to other acts of negligence, "and that said tender, attached to said engine was equipped with a coupler designed to couple automatically by impact and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on said 9th day of June, 1910, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars * * * and you further find from the evidence that on said date in the town of Marysville, Kansas, at the point mentioned in evidence, plaintiff was in the employ of the defendant and was in the performance of his duties, working in interstate commerce for defendant in coupling said tender to cars, and was be-

tween the end of said tender and cars and, while in the exercise of ordinary care, was, by reason of the fact that said coupler would not work, or accomplish the purpose for which it was designed, and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between the end of said tender and cars (provided you so find) * * * run against, upon and over by said tender and engine, and injured * * *"

The fact that this instruction required the jury to find other, additional, acts of negligence before they could find a verdict in favor of Moore, did not in any way relieve them of the necessity of finding the existence of the acts of negligence with reference to the coupler before they could find a verdict for the plaintiff, Moore. The fact that the plaintiff, Moore, assumed the burden of establishing more than one act of negligence, either one of which was sufficient to authorize a recovery, cannot be of advantage to the plaintiff in error.

III

The St. Joseph & Grand Island Railway Company at all the times herein referred to owned and operated a line of railway extending from St. Joseph in Missouri, through the towns of Marysville and

Hanover in the State of Kansas, to Grand Island in the State of Nebraska, and at all the time referred to was engaged as a common carrier by railroad in interstate commerce between the several states of Missouri, Kansas, Nebraska and other states.

The tracks of the defendant Company running through the town of Marysville, Kansas, ran in a northerly and southerly direction, trains bound toward the Grand Island terminus of the Company's road running in a northerly direction, and those bound for St. Joseph running in a southerly direction.

The railroad employes and other witnesses frequently and constantly, in testifying concerning the matters in evidence, use interchangeably the terms "east" and "south" when referring to south by the point of the compass, and the terms "north" and "west" interchangeably when referring to north by the point of the compass, for the reason that the general direction of the road was easterly and westerly.

The plaintiff, Ralph W. Moore, was a freight brakeman, in the employ of the defendant, and at the time of his injury was 22 years of age; at the time of the trial 24 years of age.

On the 9th day of June, 1910, he was in the employ of the defendant as a freight brakeman, working in interstate commerce in the movement of a train which contained cars of merchandise moving in interstate commerce.

At the time he was run upon and injured on that date the engine and tender was in the act of backing from the main line track onto the cut-off track to couple on to two freight cars which were themselves being moved in interstate commerce.

The freight train upon which plaintiff was working was running from Hanover toward St. Joseph, the eastern terminus of the defendant Company's road.

As stated in paragraph 3 on page 2 of plaintiff in error's statement and argument in opposition to the motion to dismiss, affirm or transfer to summary docket "at the trial it was admitted that defendant in error was, at the time of the accident employed by the railway company in handling interstate commerce, and the applicability of the Federal Employers' Liability Act was conceded."

The injury was received about 9:25 in the morning, in the town of Marysville.

The engine and tender with which plaintiff had been working and was working at the time of receiving his injuries was known as Number 45, and the plaintiff and the crew with which he worked had been working with this engine for a period of four days.

At a point about 600 feet north of the depot grounds in the town of Marysville a switch or cut-off track leads off of what is called the main line track to the east and runs north into the passing track and

other tracks running north and practically paralleling the main line track.

The frog frequently mentioned in evidence by the witnesses is formed by the left rail of the cut-off track and the right rail of the main track as you look north.

The distance from the switch stand to the frog is 86 feet.

On the morning of the injury the crew had been performing local switching in the Marysville yards for twenty or twenty-five minutes, and immediately before the injuries were inflicted upon Mr. Moore the engine and tender, headed south, and north of two cars, and running on the main line track, had pushed them south of the switch, and then made a flying switch to the north; that is, the engine and tender backing upon the main line track from the south and pulling the two cars, after having gained sufficient momentum, were detached from the cars, the engine augmenting its speed and backing north on the main line track north of the switch, and after it had passed the switch and the switch been thrown so that the two cars would move upon the cut-over track, the two cars by their momentum backed north on the cut-off track.

The plaintiff, Ralph Moore, turned the switch after the engine had backed north on the main line track so as to permit the cars to run north by their

own momentum on the cut-over track. The engine, after having backed far enough north on the main line track to permit the cars which ran onto the cut-off track to clear it, came south so that the rear wheels of the tender passed just south and over the switch points.

It was the intention to then back the engine and tender north upon the cut-off track and couple onto the two cars, and after pulling them on to the main line track to back them onto the train which was to be taken eastward toward St. Joseph, the destination of one or both of these cars being St. Joseph.

With this end in view, the plaintiff, after having turned the switch so as to run the engine from the main line track onto the cut-over track, stepped to the side of the tender, near or at the rear end thereof, which extended a foot or two over the rear wheels, and possibly that distance north of the switchpoints, and endeavored to prepare the coupler on the rear of the tender so that it would couple by impact with the coupler on the end of the car to which it was designed to attach the engine and tender.

The plaintiff endeavored to prepare the coupler by lifting the pinlifting rod so as to open the knuckle of the coupler, but on account of the fact that the pin lifting rod was bent and sagged down near the center of the tender and was bent in toward the tender, the turning of the pinlifting rod in the customary and proper manner would not lift the pin so as to open

the knuckle. Thereupon the plaintiff stepped to the rear of the tender for the purpose of opening the knuckle with his hand, and while between the rails of the track, and in the act of opening the knuckle, the engine and tender was backed against and upon him.

The coupler had not been in working order for several days, and the plaintiff, Ralph Moore, had notified the conductor of the train, Roy Pigg, concerning the condition of the coupler upon the rear of the tender, and that it could not be operated by the pin lifting rod, and had been assured that it would be fixed. This information had been given to Pigg, the conductor, two or three days before the injury was inflicted upon Moore.

There were no grab irons or hand holds in the end of the tender. On each rounded corner of the rear end of the tender there were upright hand holds which extended out to the side and slightly toward the rear of the tender.

The ends of the rectangular sides of an iron ladder ran from a point slightly above the buffer beam upon which the iron portion of the tender rested, to the top of the tender, in which ladder were three round rungs, the lowest of which was a distance of in excess of two feet above the top of the coupler.

A pin lifting rod ran across the rear of the tender a slight distance above the buffer beam. There were

iron stirrups suspended from each side of the tender at or near its rear end.

To the right of the coupling device, as you face the rear of the tender, there was a rubber air hose, and a rubber hose for the bell cord, which extended from the lower edge of the buffer beam down to within a few inches of the track.

To the left of the coupler, facing the rear of the tender under the same conditions, was a rubber steam hose which extended from the lower edge of the buffer beam to within a few inches of the ground.

At the time the engine started to back up, Moore had not given any signal for it to do so, and was not expecting that the engine would be backed.

When it did back the movement of the tender caused the rubber steam hose to swing and trip him. Just what took place is best told by the questions and answers (omitting the objections and arguments of the counsel and rulings of the Court), Transcript of Record, 24.

> Q. Now, what happened when you were there? Tell what took place.
>
> A. I went in to open the knuckle. While I was in there the engine started to back, the steam hose swung out, tripped me—I tried to get away—to back out—I looked to grab for the grab-irons when I saw I was falling, and there was none there; just then I grabbed—whether I

grabbed the bell cord hose or the air hose, I could not say—but I grabbed something there.

Q. Which hand did you grab with?

A. I grabbed with my right hand; I grabbed and swung around like this, hanging on all the time (indicating), and when I came down with my hand, and grabbed the rail.

Q. Which hand did you grab the rail with?

A. I grabbed the rail with my left hand.

Q. Now, which rail did you grab, Mr. Moore?

Q. Now, Mr. Moore, what hand did you grab the rail of the track with?

A. With my left hand.

Q. Will you tell the jury what rail it was you grabbed with your left hand?

A. I can point to the rail there.

Q. Shall I point to it for you? Just place it where you want it.

A. This rail right here (indicating).

Q. That would be the west rail of the crossover track, is that correct, Mr. Brown?

A. That is what it would be.

Mr. Brown: I don't know, Mr. Parkinson.

Q. What effect did the movement of the engine have on the steam hose?

A. It made the steam hose swing between your feet and against your feet, in your road, and cause you to trip.

When Mr. Moore fell, he hollered and held on as long as he could to the tender. He was dragged for

a considerable distance, and when he was taken out from under the tender and engine he was at a point estimated by the different witnesses, some within three feet of the point of the frog, and by some within ten feet of the frog.

After he had been removed from under the engine he was taken to a house about a block distant from the railway tracks, and later on the same day brought to St. Joseph.

His left hand with which he grabbed the south or west rail of the cut-over track was found with the fingers still in the glove as it gripped the rail where it had been cut off by the engine wheels running over it at a point just twelve feet north of the switch points.

The injuries inflicted upon Mr. Moore necessitated the amputation of both of his arms a few inches below the elbows. Constantly since the accident he has suffered terrible pains. He feels pains as if in his lost fingers when his stubs come in contact with anything. The bones of his left leg were crushed, and the leg was left two and a half inches shorter than the right one. All of the muscles on the left side of the leg below the knee are gone. The foot cannot be raised at all. The limb pains him constantly and especially at night and when there is a change in the weather.

For the convenience of the Court we are printing as an appendix the sections of the Employers' Liability Act and the Safety Appliance Acts, which are applicable to this controversy.

The particular trouble with the coupler was that the pin-lifting rod, which was a part of the automatic coupler, was sagged or bent down in the center and bent towards the tank so that when it was turned the chain was too long by reason of the bent condition of the pin-lifting rod to operate or raise the pin which operated and opened the knuckle (Transcript of Record, 20).

The condition of the coupler and its parts, the pin-lifting rod, made it impossible to operate the coupler without the necessity of employes and this plaintiff going between the end of the tender and the cars to which the coupling was to be made (Transcript of Record, 20-21).

In this connection it will be noted the care with which the plaintiff performed his duties. Although he knew the automatic coupler was not working, yet before going behind the tender of the engine he took the precaution of making the attempt to prepare the coupler by the use of the pin-lifting rod (Transcript of Record, 36).

The injury was inflicted on Mr. Moore on June 9th, 1910, and the hearing was had in the middle of February, 1912.

The accuracy and credibility of Ralph Moore's testimony was given the supremest test when it is realized that he was testifying to a condition at the rear of the tender as it existed on the several days prior to his injury without any opportunity of refreshing his memory, for after his injury the contention of

the defendant and the admitted fact is that tender 45 was completely reconstructed. He had no knowledge of the existence of the photograph marked "Defendant's Exhibit 3," found facing page 148.

Is it to be wondered at that when this photograph was handed to him by Mr. Brown for the purpose of questioning him with reference to other conditions on the rear of the tender after he had given the sworn evidence concerning the condition of the pin-lifting rod on the rear of the tender, that Ralph Moore cried out (Transcript of Record, 54):

> A. "* * * May I show that picture to the jury, Mr. Brown?"

This picture was taken by the defendant in St. Joseph, Missouri, on the same day of and after the injury to Mr. Moore.

By reason of the indistinctness of the photograph as reproduced in the transcript of record, we are asking to have filed and deposited with the Clerk the original exhibit.

It unalterably and conclusively sets at rest the credibility of Ralph Moore's testimony with reference to the coupling device. The Court will notice the row of bolts along the lower edge of the rear of the tender just above the buffer beam, and by comparison the sagging down of the pin-lifting rod in the center about an inch and a half, just in absolute accordance with the testimony of Ralph Moore.

At this point we ask comparison of the evidence of the defendant's witnesses given in connection with

this indisputable fact, as a gauge by which to determine their credibility. J. T. Forrest, testifying for the defendant (Transcript of Record, 144).

Q. And where in reference to that buffer beam, did you say that the pin-lifting rod was?
A. On top.
Q. On the top?
A. Yes, sir.
Q. And how close to the top?
A. It was about two and a half inches.
Q. Above the top?
A. Above the top, yes, sir.
Q. When you examined it that day do you know whether it sagged down in the center?
A. It did not.
Q. Stood perfectly straight?
A. Yes, sir.

Further illustrating the value of this witness' evidence in connection with the photograph showing the condition on the rear of the engine on the evening of that day, we direct the Court's attention to the evidence of the same witness (Transcript of Record, 144-5).

Q. Now, then, whereabouts was the buffer beam in reference to the iron tender of the engine?
A. At the rear end of the tender.
Q. Was it directly beneath it?
A. Yes, sir.
Q. Would you say that the iron of the tender came out flush with the buffer beam?
A. No.

Q. How would that be? What is your recollection on that point?

A. It would probably be about six or eight inches.

Q. Do you think the buffer beam is out—projects out six or eight inches from the iron of the tender?

A. Yes.

Q. That is from the body of the tender that held the coal?

A. Yes, sir

Q. It was in the rear that much?

A. Yes, sir.

Q. And projected out?

A. Yes, sir.

In comparison with Ralph Moore's straightforward testimony in connection with this indisputable fact concerning the pin-lifting rod, will the Court note the evidence of C. H. Conkwright, glibly testifying for the defendant (bot. 150):

Q. Did you see the picture taken of this?

A. Yes, sir; there was a man come there to take the pictures before I left.

Q. Did he take the pictures before or after you examined the engine?

A. Well, he took it after I examined the engine.

Q. After you examined the engine?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. Did the coupler—did the pin-lifting rod, that you examined, sag down in the center?

A. No, sir.

Q. It was perfectly straight clear across the rear end of the engine?

A. Yes, sir.

If it is not inappropriate at this point, we take occasion to suggest to the Court that Roy Pigg, the conductor, had been informed about the condition of this coupler before the injury was inflicted on Ralph Moore, and that without any complaint from Ralph Moore, after his injury and while his life blood was then believed to be oozing away, communication of some kind had taken place between the defendant's agents concerning the equipment on the rear of the tender and the condition of the coupling device, for we find that when it arrived in St. Joseph on the same day on which this engine had crushed Ralph Moore, the superintendent had invited two or three superintendents of other railroads to meet him for an examination of the coupling device and the equipment on the rear of the engine, and had provided a photographer to assist them in perpetuating what they might discover.

There is no contention that Ralph Moore had at this time filed any complaint or petition, or had made any verbal charge concerning the cause of his injury, and whatever of value there may be given to the evidence of these men, contradictory as it is of the indisputably proven fact concerning the condition of the pin-lifting rod and the buffer beam, etc., perpetuated as it has been proven by the photograph and contradicting their verbal evidence of what was found and rendering their entire evidence incredible of belief, we

know that at that moment the negligence of the defendant company was well recognized by it and the conductor, Roy Pigg, and the defendant was then preparing to deny its negligence, and we say to this Court that if the coupling device worked when the engine reached St. Joseph by the movement of the pin-lifting rod, which we deny, it is not persuasive to dispute the evidence of Ralph Moore, which is in accord with every physical and undisputed fact in the case, to the effect that the coupling device on the engine did not work for the three or four days while it was in use by the crew of which he was a member prior to the moment of his injury.

When guests are invited to a banquet or feast, some preparation is made for the occasion. The enigneer's remembrance of the movements of his engine after Moore's injury is blank. He doesn't remember where it moved and when (Transcript of Record, 117).

Neither of the brakemen remember observing the condition of the coupler on the tender after the injury to Moore or coupling the tender of the engine to the caboose.

William Shepard, brakeman, testifying (Transcript of Record, 135):

Q. And what was the caboose coupled to?
A. To the engine.
Q. To the tender of the engine?
A. To the tender.
Q. To the tender?
A. Yes, sir.

Q. Who coupled it to the tender?
A. I don't remember.
Q. Do you remember who coupled it to the tender on that occasion?
A. No, sir.

Witness Coy, the other brakeman, testifying (Transcript of Record, 139):

Q. Do you know who coupled that caboose into the tender at Marysville?
A. I could not say.
Q. It would be either you or the brakeman, Mr. Shepard?
A. It would be one of us.

There was every opportunity given the conductor, Roy Pigg, to make the preparation for the approaching feast or banquet while the engine was at Marysville, Kansas. The Court will note by again observing the photograph how easy the chain operated by the pin-lifting rod could be shortened by the substitution of a shorter U-bolt at its joinder with the pin-lifting rod. We shall take occasion later to further comment on the evidence of witness Roy Pigg.

With reference to the absence of hand-hold and grab-iron equipment on the rear of the tender of the engine.

There can be no dispute about the evidence with reference to the equipment on the rear of the tender of the engine. There was no hand-hold or grab-iron in the rear of the tender. The witnesses testifying for the defendant testified that the pin-lifting rod and the

ladder could be used as grab-irons and as effectively as grab-irons or hand-holds themselves.

The grab-irons or hand-holds on the corners of the tender were not in the end of the tender as required by law; they extended to the side of the tender and slightly to the rear as will be seen in the photograph. The exact equipment which was on the rear of this tender is the equipment which both parties agree was on the rear of the tender at the time when Moore was hurt, as shown in the photograph.

Again directing the Court's attention to the photograph, you will notice that from the point where the photograph was taken you can see directly between each side of the tender and the hand-hold on each side.

The plaintiff and all of his witnesses, including the employes Malone, Wasserkrug, Barry and others, who worked for other railroads, testified that the pin-lifting rod and the ladder were not grab-irons or hand-holds and not suitable for use as such. Their evidence and the admitted facts as to where and how they were fastened on the tender conclusively show that the pin-lifting rod was not secure or intended to be secure; that it was placed upon the rear of the tender designed to turn and would turn; it also had lateral motion. It was not the size of a hand-hold or grab-iron. It was placed too close to the tender for use by employes as a grab-iron. The upright portions of the ladder were of rectangular iron; the rungs of the ladder were not in a location where they could be used in connection with coupling or uncoupling the tender.

With reference to the credibility of plaintiff's testimony concerning the manner in which he was injured and the testimony of the witnesses Roy Pigg, George Miller and William H. Temps.

In considering the matters concerning the manner in which the injury was inflicted on Mr. Moore, there are certain admitted facts or facts proven so indubitably that for the consideration of the case they may be considered admitted. One of these facts will become important, and that is the distance from the switch point to the frog. This distance is 86 feet by actual measurement (Transcript of Record, 16).

It will be remembered that on the afternoon of June 9th, 1910, M. A. Hartigan, a claim agent for the defendant, performing the work of a claim agent (cross-examination of Mr. Moore, Transcript of Record, 49):

> Q. Do you know young Mr. Hartigan, who was an assistant superintendent of the Grand Island?
>
> A. The one that was the claim agent?
>
> Q. He was in the claim department and was an assistant superintendent.
>
> A. I guess I know the one you mean.

but who in his evidence endeavors to give himself the position of working in an unbiased capacity as assistant superintendent, without any mention of his capacity as claim agent (158), appeared in Marysville, and selected three citizens who proceeded to the tracks where Mr. Moore was injured, for the pur-

pose of taking measurements, while Moore was being moved to the hospital in St. Joseph. These men were E. O. Weber, R. C. Guthrie and Mr. Thompson; two of these men were produced at the trial; the third, Mr. Thompson, was not. Mr. Lonergan, the defendant's local agent, was present. A document concerning the result of their observations and the various distances was made out, marked down and signed by them, such was the importance of their observations. At the time of the trial and at the time of the taking of the deposition of the claim agent, Hartigan, this document if not suppressed, was not produced.

However, all of the witnesses state that Mr. Moore's body was removed from the track at a point about 70 feet north from the switch points, except Mr. Lonergan, who testifies to this effect in one portion of his evidence (124), but who later contradicts himself in effect by saying that the blood spot was south of the frog point about 4 feet.

It is impossible to read the evidence of Mr. Lonergan and not be convinced that at some time there had been impressed upon his mind some main fact in connection with the use of the words fifty feet, about which he should never permit himself to be broken down by cross-examination, and that he gave his evidence concerned more with this injunction than the oath he took to tell the truth, the whole truth and nothing but the truth. We quote a portion of his cross-examination to show how unsatisfactory and confusing it was (Transcript of Record, 126-128).

Q. Now, Mr. Lonergan, I just want to see if we can help the jury a little about these distances. Can you tell us the distance from the switch point here to the joinder of the frog?

A. Well, it is in the neighborhood of fifty feet.

Q. Fifty feet?

A. Yes, sir.

Q. You think that from this switch point to the joinder of this frog is in the neighborhood—

A. You mean the point of the frog?

Q. I mean the joinder of the frog, yes. You think it is fifty feet?

A. Yes, sir; it is very close to fifty feet.

Q. Isn't it more than fifty feet?

A. Well, I would not hardly think so, no.

Q. So that you think that Mr. Moore was found over on this side of the frog, then?

A. No, sir; he was not.

Q. Which side was he found on, the south?

A. Well, the blood there was right about where your finger is now, over on the other rail.

Q. But you told the jury a minute ago that that was seventy feet north of the switch point, and now you say it is only fifty feet to the joinder of the frog, and yet a minute ago you told us that he was found seventy feet north, now which is correct?

A. I beg your pardon, I was asked the question as to where he was laying.

Q. Oh, where he was laying?

A. Yes, sir.

Q. And you said he was lying right opposite to the pool of blood, just west of the pool of blood?

A. A little to the west.

Q. A little to the west of the pool of blood?

A. Yes, sir.

Q. This is the west? (indicating).

A. Yes, sir.

Q. And that is seventy feet? You think now that the joinder of the frog here was only fifty feet, and he was down in here? (indicating).

A. No, sir.

Q. Well, what do you mean, then? Explain that to the jury so they will comprehend what you mean.

A. I said that it was about fifty feet from the point of the frog.

Q. To the switch point?

A. To the switch point.

Q. To the joinder of the frog here?

A. To the joinder—well, about that; yes, sir.

Q. And the blood spot was down here about seventy feet?

A. No, sir, it was not.

Q. Was it?

A. No, sir.

Q. Did you say a moment ago that it was seventy feet?

A. I said it was about as near as I can remember.

Q. About seventy feet?

A. Yes, sir.

Q. What do you want the jury to under stand now? Was that blood spot seventy feet north of the switch point?

A. I want the jury to understand that the blood spot was south of the frog point, of the point of the frog about four feet.

Q. About four feet? But you say that that joinder of the frog is only about fifty feet north of the switch stand?

A. Yes, sir.

Q. Well, now, if you say from the switch point, the point of the switch to where the blood was found was seventy feet, and it was found south of the frog, how do you reconcile that? How do you explain that to the jury?

A. The blood spot was about four feet south of the point of the frog, about three or four feet.

Q. About three or four feet this side?

A. Yes, sir.

Q. Well, now, you say this was only seventy feet?

A. About fifty feet; yes, sir.

Q. From this switch point?

A. Yes, sir.

Q. And yet from here to here, which is closer to the switch point, is seventy feet (indicating).

A. No, sir.

Q. Well, what do you mean to say, then?

A. I mean to say that where he was laying; he was laying practically about opposite—I did not say exactly opposite. I said about opposite.

Q. Now, all right. Now, you want to say that. Just tell the jury he was north or south of the blood spot when he was laying out by the side of the track?

A. Well, he was—just about opposite of the blood.

Q. Just about? The distance between the fifty and the seventy feet you want to take up in about, is that it?

A. Well, I have not got the exact distances.

Q. You are talking about a measurement that you went there that afternoon to make?

A. I was there when the measurements were made.

Q. Did you examine the rail? Did you examine the rail? You said you examined the rail all along there? Did you examine it north of the frog north of that fifty feet?

A. Yes, sir.

Q. And this blood spot was within three or four feet of the joinder of the rail?

A. Of the joinder of the frog; yes, sir.

Q. Of the joinder of the frog, which is three or four feet?

A. Yes, sir.

With these distances in mind, we will examine the evidence given by Ralph Moore, which is supported by every physical fact in the case, and then compare the evidence for the defendant—Temps, the fireman; Miller, the section man; and Pigg, the conductor, and show conclusively to the Court how not only was their testimony opposed to the physical and admitted facts in the case, but how opposed and absolutely contradictory the testimony of each was to that of the other.

Ralph Moore's statement was that after—through the force of custom—endeavoring to operate the coupling device by means of the pin-lifting rod and finding it did not work, he stepped to the rear of the tender to adjust the knuckle, and while in this act the engine backed, that the steam hose swung

against his feet and tripped him, and he attempted to back away from the tender, and realizing that he was going to fall, looked for hand-holds or grab-irons in the rear of the tender, and seeing none, grabbed either the air hose or the bell cord hose to the right of the tender as you face it, and fell back, swinging to the rear and catching the left hand rail of the cut-over track, as you view the track looking from the south that his hand was cut and he continued to hold himself as long as he could and hollered to stop the engine; that he finally was forced to let go and was rolled by the engine, and his other hand and leg crushed and injured. In support of his evidence, his left hand was found just after the injury, severed from his arm, where the engine and tender had run over it, but still gripping the west rail of the cross-over switch at a point just twelve feet north of the switch points (Samuel Baughman, Transcript of Record, 55).

Q. While you were down there did anyone call attention to a part of Mr. Moore's body?

A. One man did. I think he was a brakeman, but I would not state positively.

Q. And what did he say?

Mr. Brown: I object to what he said.

The Court: Objection sustained.

Q. Did he call your attention to any part of Mr. Moore's body?

A. Yes, sir.

Q. What part of his body was that?

A. A part of his left hand.

Q. Where was the left hand?

A. Gripping the west switch rail.

Q. The west switch rail of what track, Mr. Baughman?

A. The track branching from the main track to the east.

Q. You mean the cross-over track (indicating).

A. Yes, sir.

Q. Did you pick that hand up?

A. About twelve feet from the point of the switch rail.

Q. Who picked the hand off the rail?

A. I did.

Q. And this is the rail that it was on—right here? (indicating).

A. Yes, sir, the west rail.

Q. The west rail of the cross-over switch?

A. Yes, sir.

Q. Now show the jury how it was gripping that rail, Mr. Baughman.

A. It was gripped over the rail in that manner (indicating).

Q. And what part of the hand was in the glove?

A. The four fingers and part of the hand, and possibly that far down of the hand (indicating).

Q. When you picked this hand up it was still fastened to the side of the rail?

A. The glove was sticking to the rail and some of the flesh.

Q. And that was twelve feet north of this switch point?

A. Yes, sir.

Q. What did you do with that hand when you picked it up?

A. I stood there and held it and waited a few minutes, and then took it down to Mr. Roseberry's.

Q. Who did you deliver it to?

A. To Roy Pigg, the conductor.

Q. What did he do with that hand?

A. Took the fingers out of the glove, took the rings off his fingers and put them in his pocket, and put the hand in the canvas that was under Mr. Moore.

Q. Those rings were turned over to Mr. Moore, or do you know about that?

A. Mr. Pigg put them in his pocket at the time.

Q. You don't know when they were turned over to Mr. Moore?

A. No, sir, I do not.

Q. Mr. Baughman, did anyone come to see you later in the day about this matter?

A. Yes, sir.

Q. Who?

A. Mr. Lonergan and Mr. Hartigan.

Q. Who is he?

A. Mr. Lonergan is the agent at Marysville.

Q. Who is the other man?

A. I think at that time he was the claim agent for the Railway Company.

Q. Did you show them the point where this was found?

A. Yes, sir, I did.

In view of the denial by Roy Pigg, the conductor, that Samuel Baughman found the hand and brought it over to the Roseberry house, and in view of the fact that he, Roy Pigg, claimed himself to have found the

hand and taken it over to the house, it is well at this point to establish by the defendant's own witness the venality of Roy Pigg's statement upon this point. We direct the Court's attention again to the evidence of William Lonergan, the station agent of the defendant company, testifying in behalf of defendant (Transcript of Record, 129).

Q. You know this, don't you, Mr. Pigg did not pick that hand up and put it on that board that the man was on underneath that tarpaulin, did he? You did not see Mr. Pigg do that, did you?

A. No, sir I did not?

Q. He did not do it, did he?

A. I don't know whether he did or not.

Q. You could not say who found the hand, could you?

A. I could say who brought it to Mr. Roseberry's house.

Q. And that man was Mr. Baughman, wasn't it?

A. Sam Baughman, yes, sir.

Q. Sam Baughman was the man that did it?

A. Yes, sir.

Q. And the same man who testified here yesterday, who you have been down to the St. Charles hotel with, and you saw him down there?

A. I did not see Sam Baughman testify, sir.

Q. I say, the same man you saw down at the St. Charles hotel?

A. Yes, sir.

Q. The same Sam Baughman?

A. Yes, sir.

Ralph Moore further testified that at the moment and prior to the time that he was at the switch stand and turned the switch to permit the tender to back north upon the cut-over track the witnesses, Miller and Roy Pigg, were standing south of the switch (Transcript of Record, 38, cross-examination).

> Q. Did you see Mr. Pigg, the conductor in charge of that train, and the section foreman, Mr. Miller, standing near the switch there?
>
> A. I saw them standing south of the switch; yes, sir.
>
> Q. Well, south of the switch. How many feet south of the switch do you say they were?
>
> A. I should judge eight or ten feet south.

In corroboration of Mr. Moore's testimony upon this point, concerning the whereabout of Roy Pigg and Miller, we quote from the evidence of William Temps, the fireman (Transcript of Record, 103-4).

> Q. (Reading) Did you see anybody standing alongside the track on the east side of the main line besides Ralph Moore when you made the drop?
>
> A. Not then.
>
> Q. If anybody had been there would you have seen them?
>
> A. Yes, sir.
>
> Q. After you made the drop you brought your engine north on the main line so that the wheels of the tender were south of the switch point?
>
> A. Yes, sir.
>
> Q. Do you remember about how far?
>
> A. No, sir.

Q. They might have been just a foot over or they might have been two or three feet over?

A. Yes, sir.

Q. Or half a dozen feet over?

A. Yes, sir.

Q. Or a dozen feet over?

A. No, they were not a dozen feet over.

Q. Now you made those answers in reply to those questions, didn't you?

A. Yes, sir.

Q. Now when your engine came in a northerly direction to cross over the switch at that time, did you see anyone else standing along the side—in that immediate vicinity?

A. After we made the drop?

Q. On the east side?

A. After we made the drop?

Q. Yes, after you made the drop?

A. Yes, sir; I saw Miller.

Q. Where did you see Miller?

A. I saw him right east of the switch.

Q. I did not mean east. I mean whether north or south?

A. I could not exactly tell that now.

Q. You could not?

A. No, sir.

Q. Did you see Pigg there then?

A. Yes, sir, I saw Pigg after we pulled over with the engine above the switch.

Q. Did you see where Pigg was then?

A. He come right in front of the engine after we pulled up there.

Q. Was he south or north of the switch?

A. He was south of the switch.

Q. You tell this jury he was south of the switch?

A. Yes, sir.

Q. And don't know that Miller was right with him south of the switch and east of the main line track?

A. Yes, sir.

Q. You are positive of that fact, are you not?

A. Yes, sir.

Q. And they were about how many feet south of that switch?

A. I could not exactly tell that now.

Q. Four, five or six feet south of the switch, anyway?

A. Yes, sir.

Q. And apparently they were talking together?

A. They were.

Q. Now north of them quite a distance, was Ralph Moore, wasn't he?

A. Yes, sir; a couple of feet.

Q. A couple of feet?

A. Yes, sir.

Q. Why, he was north of the switch after he turned it right then?

A. Yes, sir.

Q. And he stood north of the switch at the time he turned it, didn't he?

A. Yes, sir.

Q. And now you tell this jury that he was north of the switch at the time he turned it, and that Pigg and Miller were south of the switch at least four or five feet, standing there together? That is right, isn't it?

A. Yes, sir.

It is true that Mr. Temps' testimony with relations to what Mr. Moore did and when he went behind

the engine is contradictory of Mr. Moore, but his evidence is absolutely contradictory and cannot be reconciled with the proven fact of the finding of Ralph Moore's hand just twelve feet north of the switch point, and his evidence concerning Miller and Pigg is as positively contradictory of their evidence which will be set out later. We here further quote from Temps' evidence (Transcript of Record, 106):

Q. What is the next thing that occurred after he got off? How far north of the switch stand was he then?

A. About forty or fifty feet.

Q. You made that answer to that question?

A. Yes, sir.

Q. Mr. Miller and Mr. Pigg were still standing south of the switch stand?

A. Yes, sir.

Q. You made that answer, didn't you, a year ago, and that was correct then, wasn't it?

A. Yes, sir.

Q. Is it correct?

A. Yes, sir.

Q. Mr. Miller and Mr. Pigg were still standing south of the switch stand?

A. Yes, sir.

Q. They were south of the switch stand?

A. No, they were walking up north toward the cars.

Q. Had they taken many steps.

A. No, not very many. About thirty or forty feet.

Q. They were about even with you at the time he got off the ladder at the side of the en-

gine and you were about even with the switch point?

A. About five feet past the switch point and about twenty feet from the switch point from the hind end of the tender.

Q. And they were just about even with you?

A. Yes, sir.

Q. And just about even with the switch stand?

A. Past about five feet north.

Q. They had moved from the point four feet south of the switch stand to a point five feet north of the switch stand?

A. Yes, sir.

Q. What is the next thing that attracted your attention?

A. Pigg hollered and flagged.

Q. What did he say?

A. He hollered and said we caught Ralph Moore.

Q. You remember that distinctly, don't you?

A. Yes, sir.

Q. Now at the time Pigg and Miller were standing together, weren't they side by side?

A. Yes, sir.

Q. They were standing side by side?

A. Yes, sir.

Q. You had passed north of them so that they were south?

A. They were just straight east of me when they hollered.

Q. They were not any north of you when they hollered?

A. No.

Q. How far did the train run before the stop?

A. About thirty feet.

Q. Did Ralph Moore talk to either Pigg or Miller while he was standing at the switch?

A. No, sir.

Q. And you never heard Miller talk to Moore?

A. No, sir.

Q. And you never heard Miller give him any orders or speak to him anything about a carload of frogs, did you?

A. No, sir.

Q. And you never saw any carload of frogs in the yard, did you?

A. I did not.

Q. Are you positive?

A. No, sir.

The testimony of the witness Miller was absolutely contradictory of the witness Temps, and is also absolutely contradictory of the witness Pigg. Owing to its great length we quote excerpts from his testimony (Transcript of Record, 87).

Q. Did you talk to Conductor Pigg before the accident?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. You have no recollection whatever of saying to Pigg, "Hello, Pigg," and his saying to you, "Good morning, Miller?"

A. No, sir.

Q. And that did not take place, did it?

A. Not in my knowledge.

Q. When you saw Moore standing by the switch, how far north do you say you were of the switch?

A. Probably ten or twelve feet.

Q. And east of the track?

A. Yes, sir.

Q. Whereabouts at that time was Pigg, if you know?

A. Pigg came across from the west side of the track to cross the—

Q. (Interrupting) Was that before the engine went over the switch or when it came back?

A. Just about the time the engine started back, if I remember right.

Q. As the engine was going north?

A. Yes, sir.

* * *

Q. Do you want to tell this jury that as the engine was backing north, that you saw Pigg walk north of that engine, of that moving engine?

A. Yes, sir; just stepped north of the tender, across to the east side.

Q. And how far south or north of you, where was he?

A. He was about ten or twelve feet north of me.

Q. He was about ten or twelve feet north of you?

A. Yes, sir.

Q. And when he came over there, what did he do?

A. He stood there until after the accident occurred.

* * *

(Transcript of Record, 88).

Q. You don't undertake to tell this jury what that man was doing when he went in there between or back of the tender, do you?

A. No, sir; I don't know what he was doing.

Q. If he went to fix the knuckle, you cannot tell the jury whether he did or not, can you?

A. No, sir.

Q. And you were about how many feet south of where he was?

A. I don't just remember how many feet.

Q. What, to the best of your recollection?

A. It would be fifteen or twenty feet.

* * *

(Transcript of Record, 94).

Q. Had Moore given the signal when the conductor started across from the west to the east side of the track?

A. Yes, sir.

Q. Did you make that answer to that question?

A. Yes, sir.

* * *

Q. You saw him as he was running behind the engine?

A. Yes, sir.

Q. Did you look underneath the engine?

A. I could see him standing up?

Q. How far was he north of you when he fell?

A. He ran a few steps behind the tender. About eight or ten feet.

Q. Did you make those answers to those questions?

A. About; I did not say exactly, did I?
Q. About that?
A. Yes, sir; about.
Q. There was an interim when he got on the ladder that you could not see him?
A. At the time he went behind, of course, I could see nothing but his feet where he was running.
Q. Did you stoop down to see his feet?
A. No, sir
Q. Stood up and saw his feet?
A. Yes, sir.
Q. You could see him running about eight or ten feet?
A. Yes, sir.
Q. Where was he with reference to the track?
A. About the center.
Q. Did you make those answers to those questions then?
A. Yes, sir.
Q. The tender had passed about eighteen feet north of you when he fell?
A. Yes, sir.
Q. That brought the engineer and fireman about even with you?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.

It is incomprehensible to us that any person could stand up at the side of a tender and see back through it or under it and see a man running back of the tender in the center of the track or see his legs moving as he ran in the center of the track. However, if this be possible, if by any stretch of imagination Miller was

where he says he was and was telling the truth, then once and for all he convicts the witness Roy Pigg of perjury.

Before quoting from the evidence of Roy Pigg and in considering its many contradictions when compared with the physical facts and the testimony of Moore, and the testimony of Temps and Miller, and the known facts about where Moore's body was taken from beneath the engine, we take this occasion to fathom, if possible, what kind of a man Roy Pigg was with reference to being subservient in his desire to please the defendant.

When his deposition was taken and a question of vital importance to the plaintiff still remained concerning whether or not Moore was working in interstate commerce, the conductor, Roy Pigg, had a book containing evidence which the attorneys for Mr. Moore believed to be of value. The attitude of command and control of the witness by the defendant and its attorney, and his subserviency to their wishes, is clearly shown by a reference to page 78 of the Transcript of Record.

> Q. Have you any objection to leaving the book with us until after the trial?
> A. I will take care of the book.
> Mr. Brown: No, don't give them the book.

When it is remembered that the plaintiff was taking Roy Pigg's deposition and that he was supposed to have left at that time the employ of the defendant, can this Court or anyone have any doubt

—after reading the foregoing—what effect a cross-examination of Roy Pigg by the attorney for the defendant Company to ascertain what the facts may have been before he submitted to examination by the attorneys for the plaintiff, such as was given to the plaintiff, Ralph Moore, during the trial, would have had on his forthcoming testimony.

We refer to the cross-examination by Mr. Brown of Mr. Moore, occurring on the bot. of 37, Transcript of Record. It will be remembered that not a single witness for the plaintiff or defendant testified that the engine, before backing, at the time Mr. Moore was hurt, went more than a few feet south of the switch points.

> Q. You tell the jury now, don't you, that the wheels did go far enough to clear the switch points?
>
> A. It had to go far enough to throw the switch.
>
> Q. You could not throw the switch otherwise?
>
> A. Unless the wheels went over the points of it.
>
> Q. Then while it was in that position, wherever it may have been, while in that position, he backed the engine, didn't he?
>
> A. He did when I was behind it.
>
> Q. And that threw you down or you were thrown down?
>
> A. Yes, sir.
>
> Q. **Don't you know that the rear end of the tender stood out there anywhere from thirty to fifty feet south of the switch?**

A. How is that question?

Q. Don't you know that the rear end of the tender stood out here from fifty to sixty or seventy-five feet south of the switchstand, where you stood?

A. It absolutely did not.

Q. It did not?

A. No, sir.

Q. So you are just as positive about that as of anything else you have sworn to, are you not?

A. Why, I have no reason to be otherwise.

Q. I say you are, are you not?

A. I am positive it was just over the switch points.

It may be well to keep in mind the mental attitude of the witness and the fact that the defendant's attorney had the opportunity of using his inimitable style of finding out what the facts were as we follow.

Roy Pigg testifying—excerpts from his evidence (Transcript of Record, 61):

Q. Where did the engine go after you got off?

A. Back the main line over the switch.

Q. Did you stand where you were?

A. Did until the engine went by me and then I walked across the track on the east side.

* * *

(Transcript of Record, 62).

Q. About fifty feet north of the switch stand?

A. Yes, sir, but walked back possibly 10 or 12 or 20 feet?

Q. Which direction were you looking as you walked that way?

A. Looking at Mr. Miller, the section boss, foreman.

Q. Where was he?

A. East side of the track?

Q. Whereabouts?

A. Near as I can remember nearly opposite the main line frog.

Q. You mean the frog north of the switch stand?

A. Yes, sir.

* * *

Q. How far would that frog be north of the switch stand?

A. I don't know the distance between the frog and the switch stand.

Q. Your best judgment, please?

A. I should judge 38 feet.

* * *

Q. And how far east of the main track was he?

A. Five or six feet.

Q. And how close were you to him when you stopped walking?

A. Right up at the side of him.

Q. Which way was he facing?

A. South.

Q. Which way were you facing?

A. Facing south.

Q. Were you standing east or west of him?

A. West side of him.

Q. You were standing then directly west of him and between him and the track?

A. Yes, sir.

Q. And right next to him?

A. Yes, sir.

Q. Were you talking to him?
A. Just started to talk to him.
Q. What did you say to him?
A. "How do you do, Miller?"
Q. What did he say?
A. "Hello, Pigg."

It will be remembered that the witness Miller positively denies talking to the witness Pigg.

After testifying that Moore got upon the rear of the tender, the witness further testifies (Transcript of Record, 64):

Q. What did he do then?
A. Got off and started to the other side of the track.
Q. How many steps did he take?
A. Could not state, maybe two and maybe three.
Q. Got inside the track between the rails?
A. Yes, sir, one foot over the rail and one on the east side rail.
Q. Then he was not between the main line rails?
A. Yes, sir.
Q. And then what happened?
A. Stumbled and fell.
Q. Which way did he fall?
A. Right across the other cut-off rail.
Q. With his body?
A. Yes, sir.
Q. What did he stumble over?
A. Looked to me like the main line rail.
Q. And he fell with his body directly west of the cut-off rail?

A. Yes, sir; he fell like this and turned, went over one hand at a time.

Q. He was going from the east side of the track over to the west side of the track, you say?

A. Yes, sir, he was—I don't know what his intention was, but suppose he was going to get on the engineer's side because other men would be working on the other side.

* * *

(Transcript of Record, 65):

Q. Did he regain his feet?

A. No, sir.

Q. The wheel ran over his body, did it?

A. No, sir.

Q. Where did he have his hands?

A. I did not see where they went—saw the wheel go over one of them.

Q. How did he fall, flat on his stomach?

A. No, sir; on his side.

Q. Which side?

A. Apparently on his left side.

Q. Fell on his left side with his body right over the west rail?

A. Yes, sir, fell pretty much like this and looked like he tried to get himself back, looked like he had presence of mind enough to try to draw his body back between the rails.

Q. How far was he from the engine at that time?

A. He was up against the tank, might say right up to it.

* * *

(Transcript of Record, 66):

Q. Standing beside you was Section Boss Miller? He saw it, too?

A. I suppose he did, he stood there beside me.

Q. And had just as good a view as you had?

A. Possibly.

Q. You remember distinctly he was standing beside you?

A. Yes, sir.

Q. That is, you were standing on the west side of him and he on the east side of you?

A. Yes, sir.

Q. And about even, even as far as north and south goes?

A. No, at angles.

Q. Which north?

A. I was north, I think.

Q. A foot or two?

A. Possibly a foot.

Q. How far was Ralph Moore north of you when he fell?

A. He was not north.

Q. How far south?

A. I could not state the distance.

Q. About how far?

A. He might have been eight feet.

When the defendant submits conflicting evidence of this character by the witness Miller and by the witness Pigg, could this Court indicate which one of these two witnesses was telling the truth and which one was falsifying, or were not both these witnesses giving false evidence against their fellow employe—Miller testifying that he was south of Moore the length of the tender after it had passed north of him, and that looking through beneath the tender he saw Ralph Moore running to the rear eight or ten feet in the center of the track before he fell, denying that he ever said

a word to Pigg, and swearing that Pigg was north of him, and Pigg testifying that Miller was at his side, at not a greater distance than one foot, in the same position to view the injury that he was, looking to the south a distance of seven or eight feet, and testifying that he saw Ralph Moore stumble with his foot between the east cut-off track and the east main line track, and with his body falling over the west cut-off track right back up against the tender, and both of these witnesses testifying that they were north of the switch stand in contradiction of the evidence of not only Ralph Moore, but of William Temps, the fireman, who testified they were both standing south of the switch stand?

But if Ralph Moore had fallen as the conductor Pigg testified he did, he would have been run upon and crushed and his body cut in two then and there; while as a matter of fact he held on and was dragged until he let go just a little distance to the south of the point where his body was taken from beneath the engine.

According to Pigg's own evidence, the engine must have moved not only the distance of eight feet that he says he was north of the engine, but the added distance of the length of the tender, and the engine, which was at least thirty feet more, before the engine stopped, because when the witness Pigg and the witness Miller crossed over to the west side of the track they passed in front of the pilot of the engine.

The witness Pigg further attempted to buttress his evidence by stating that he picked up Moore's

left hand and took it over to the Roseberry house (Transcript of Record, 73-4). This evidence is directly contradicted by the witness Baughman, who found the hand, and by the defendant's witness, Lonergan, who admitted that it was Baughman who brought the hand to the house.

It will be remembered there was only one hand crushed entirely from the body, the other being crushed and hanging to the body.

This witness also attempted to deny the fact established by the photograph with reference to the condition of the pin-lifting rod, stating that it did not sag down in the center.

It is evidence of this character that shocks the mind of any righteous man, jury or Judge.

With reference to the contention of the defendant that Ralph Moore in the hospital made statements which constituted admissions against interest, the Court will not find in any single paper that he signed one syllable inconsistent with the facts as he detailed them from the witness stand. If such there be, it was the privilege of this defendant and its attorney to point them out to this Court.

It is true that the claim agent Hartigan swears to two conversations with Ralph Moore in which the plaintiff is made to give a version of the happenings of events in connection with his injury, which, if believed, might absolve the defendant from liability, but these conversations are positively denied, and this Court knows that if any such conversations had taken

place the claim agent Hartigan would have written them down and asked Moore to sign them, or at least had him admit their correctness and refuse to sign them.

And so this case is submitted to this Honorable Court in the firm and fixed conviction that the cause is just; and believing that every point raised on behalf of the plaintiff in error has been conclusively answered, and is supported by the great weight of authority, we respectfully ask that the judgment be affirmed or the writ of error dismissed.

Respectfully submitted,

JOHN G. PARKINSON,

Attorney for Defendant in Error.

Appendix "A"

EMPLOYERS' LIABILITY ACT

Approved April 22, 1908 (35 Stat. at Large 65, ch. 149; Comp. Stat. 1913, Sec. 8657).

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: **Provided, however, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.**

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, **such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.**

Appendix "B"

SAFETY APPLIANCE ACTS

Approved March 2d, 1893 (27 U. S. Stat. at Large, 531, ch. 196):

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons for greater security to men in coupling and uncoupling cars.

Amendment of March 2d, 1903, to Safety Appliance Acts:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled "An Act to promote

the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY *v.* MOORE.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 573. Argued January 30, 1917.—Decided March 6, 1917.

An action governed by the Federal Employers' Liability Act is not removable from the state to the federal court upon the ground of diverse citizenship.

Where there is substantial evidence of negligence to support the verdict in an action for personal injuries, this court will not disturb the finding of a state court.

Under the Safety Appliance Act, 27 Stat. 531, c. 196, as amended by the Act of March 2, 1903, 32 Stat. 943, c. 976, the duty to provide grab-irons or hand-holds on the ends, as well as on the sides, of locomotive tenders is an absolute duty which must be literally complied with, and claimed equivalents can not satisfy the law.

268 Missouri, 31, affirmed.

THE case is stated in the opinion.

Mr. Robert A. Brown for plaintiff in error.

Mr. John G. Parkinson for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

Moore, the defendant in error, was in the employ of the plaintiff in error as a brakeman, and was desperately injured on June 9, 1910. His claim is that at the moment of the accident he was engaged in adjusting a defective automatic coupler on the rear end of the tender of an engine, which was started unexpectedly, causing him to be thrown from his feet by the steam hose equipment, which hung down to within a few inches of the surface of the track, and that, in part because the tender was not equipped with grab-irons or hand-holds, as required by the federal law, he fell helpless under the wheels and lost both of his hands.

He recovered a judgment in the trial court, which was affirmed by the Supreme Court of Missouri, and the case is here on writ of error.

The applicability of the Employers' Liability Act to the case was admitted from the beginning, but nevertheless a petition was promptly filed for the removal of the case to the United States Circuit Court on the ground of diversity of citizenship. This petition was denied and the claim that this denial constitutes reversible error is now argued here, albeit somewhat faintly. The claim is wholly without merit, as is apparent from the plain reading of the Federal Employers' Liability Act and as is determined in *Kansas City Southern Ry. Co.* v. *Leslie*, 238 U. S. 599, and in *Southern Railway Co.* v. *Lloyd*, 239 U. S. 496.

It is claimed, with much apparent confidence, that no substantial evidence appears in the record to support the judgment of the state courts, and that under the authority of *Southern Pacific Co.* v. *Pool*, 160 U. S. 438, the judgment

should be reversed. An inspection of the record satisfies us that substantial testimony was introduced in support of the claimed negligence of the railroad company and that, applying the usual rule, the result cannot be disturbed on this claim.

But chief emphasis, perhaps, is laid in the argument upon the claim that the trial court erred in refusing to say to the jury, as a matter of law, that: "Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law," and that, therefore, if the vertical iron hand-hold, and iron rod—pin-lifting or uncoupling lever—extending across the tender just above the coupler, were so designed and constructed as to permit employees engaged in coupling or uncoupling cars to readily grasp them for their better security while in the performance of such work, the defendant was not guilty of negligence in failing to provide necessary and proper handholds or grab-irons and the plaintiff cannot recover for any injury sustained from lack of them on the engine tender.

The trial court gave this request as the law of the case, but provided, only, the jury should find "that said attachments or devices furnished reasonable security to the employees of defendant in coupling and uncoupling said tender and cars." The railroad company excepted to this modification of its request to charge and argues now that to so modify it was error.

We quite agree with the Supreme Court of Missouri in its conclusion that the giving of the company's request, even as modified by the trial court, was error in its favor, being much more than it deserved under the law.

Section 4 of the safety appliance statute provides: "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with se-

cure grab irons or handholds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars." 27 Stat. 531. This statute was, in terms, made applicable to tenders of engines by the amendment of 1903, 32 Stat. 943, c. 976.

The request preferred is an obvious attempt to secure the application of the doctrine of equivalents to the Safety Appliance Act, and to persuade the court to say that it is not necessary for carriers to comply with the law if only they will furnish some other appliance which one jury may say is "just as good" but which another jury may say is not.

It is much too late for such a claim to be seriously entertained. In the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, often approved by this court, it was settled, once for all, that Congress, not satisfied with the common-law duty and its resulting liability, in the Safety Appliance Act of March 2, 1893, 27 Stat. 531, prescribed and defined certain definite standards to which interstate carriers must conform, and of the required automatic couplers this court said, Congress has "enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or to lessen their significance."

The exercise of care, even the greatest, in supplying and repairing these appliances will not excuse defects in them,—the duty and liability are absolute. *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Taylor*, *supra*; *Great Northern Ry. Co.* v. *Otos*, 239 U. S. 349, 351. If equivalents were allowed the statute would be lost in exceptions and its humane purpose defeated in the uncertainty of litigation.

The request to charge on which the plaintiff in error re-

lies in its terms implies the absence of the required hand-holds or grab-irons, and an inspection of the photograph of the tender confirms the inference. The vertical hand-hold referred to in the request was at the corner of the tender and could be useful only to a man walking or running alongside the track to operate the uncoupling lever, or, as it is sometimes called, the pin-lifting lever. It could not be of value when the automatic coupler was not in working condition or to a man in the position in which Moore was when injured.

This grab-iron requirement first appears in the Act of 1893 and the amendment ten years later (March 2nd, 1903) 32 Stat. 943, making the requirement in terms applicable to tenders did not change it. Whatever may be said of 1893, there can be no doubt that in 1903 automatic couplers, and therefore uncoupling or pin-lifting levers, were in common, if not general, use, on the tenders of engines, and if Congress had intended them to be accepted as a substitute for hand-holds or grab-irons we must assume that the amendment of 1903 would have so provided. The statute requires both. If practical confirmation of this conclusion were desired it is to be found in the fact that in the order of the Interstate Commerce Commission standardizing safety appliances, under the Act of Congress of April 14, 1910, 36 Stat. 298, two rear end hand-holds are required on locomotives "one near each side on rear end of tender *on the face of the end sill.*"

It is not admissible to allow such an important statutory requirement to be satisfied by equivalents or by anything less than literal compliance with what it prescribes. The charge as given being more favorable to the company than it deserved, the judgment of the Supreme Court of Missouri is

Affirmed.